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AMERICAN BAR ASSOCIATION JOVRNAL

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Our Main Order of Business: The Administration of Justice

HON. ARTHUR T. VANDERBILT

Federal Taxation—1938

HON. ROSWELL MAGILL

Reform in Judicial Procedure

HON. WILLIAM D. MITCHELL

The House of Law in a Time of Change

LLOYD K. GARRISON

Practicing Law Courses

HAROLD P. SELIGSON

The Federal Judiciary

HON. JOHN J. PARKER

Review of Recent Supreme Court Decisions

EDGAR BRONSON TOLMAN

Complete Table of Contents on Page VII

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INDEX OF ADVERTISERS IN THIS ISSUE

TABLE OF CONTENTS

AMERICAN BAR ASSOCIATION
MARCH 1938 JOVRNAL VOL. XXIV No. 3

CURRENT EVENTS

First General Election of State Delegates to Be Held

THE first general election of State Delegates by mail ballot will be conducted under the direction of the Board of Elections during the month of March and the first three weeks of April. Ballots to be counted must be received at the headquarters office in Chicago not later than April 22, 1938. The time for filing nominating petitions expired February 25. At that time petitions had been received from every jurisdiction, with the exception of North Carolina, Utah and the territorial group. One petition was received from Idaho on behalf of Oliver O. Haga, but only twenty-one of the members signing the petition were in good standing, as required by Section 2, Article V, of the Constitution, and Section 3, Article II, of the By-Laws. Under these circumstances ballots sent to the members in Idaho will not contain the name of any nominee.

Two petitions were received from Kentucky. One, nominating Frank M. Drake of Louisville, was in proper form and is published elsewhere in the JOURNAL. The other was received from Mr. Richard L. Garnett, of Glasgow, Kentucky, and while it contained more than twenty-five names, only twenty-two of the signers were members in good standing, as required by the provisions of the Constitution and By-Laws, and therefore Mr. Garnett's name will not appear on the official ballots.

Two candidates were nominated in Iowa, Michigan, Missouri, New York, Ohio and Pennsylvania. This, however, does not mean that these are the only jurisdictions in which there will be contests, as the Constitution provides that there should be a space on every ballot for writing in the name of one's personal choice. In one instance last year, in an election to fill a vacancy, a very close contest developed where there was only one nominee and the name of another member was written in on the ballots.

In Hawaii and New Hampshire, while there were nominating petitions filed for the regular term, no petitions were received from any nominee to fill the vacancy. Ballots in the jurisdictions where vacancies are to be filled will provide on the one ballot space to vote for both officers. Attention is called to the fact, however, that it will be necessary for the members in those jurisdictions, namely Hawaii, Kansas, Kentucky and New Hampshire, to vote twice, once for the candidate to be elected to the regular term and once for a candidate to fill the unexpired term.

In some jurisdictions more than one hundred names were attached to the nominating petition, and in at least one instance the statement was made that more than a majority of the members in that particular jurisdiction had signed the petition and in view of this fact, it was suggested that it was an unnecessary formality to hold an election. However, the Constitution expressly recognizes the right of the individual member to vote for some one other than the nominee or nominees and also expressly directs the Board of Elections to mail ballots to each member in good standing in a jurisdiction in which an election is to be held. Under the circumstances the Board was of the opinion that the suggestion could not be adopted. The Board is considering submitting to the House of Delegates at the next annual meeting a rule limiting to fifty the names signed to a nominating petition that are to be published in the JOURNAL.

Unless the Constitution is further amended, this will be the only year in which State Delegates will be elected in all fifty-one jurisdictions. In the future all State Delegates will be elected for a term of three years and the annual elections for the full term will be held in seventeen jurisdictions each year, as prescribed by the amendment adopted at the Kansas City convention.

Mr. Justice Fairchild, of the Supreme Court of Wisconsin, as Chairman of the Board of Elections, stated that "In fixing April 22 as the date for closing the polls, the Board of Elections had in mind the fact that a meeting of the State Delegates to nominate the Association officers for the ensuing year had been called to meet in Washington, D. C., on May 11, 1938." The Board felt that the election to fill the vacancies should be concluded in ample time to permit the successful candidates to arrange to attend this meeting.

Special Committee on Law Lists Holds Meeting

A MEETING of the Special Committee on Law Lists was held in Chicago, February 16 and 17, all members and the secretary of the committee being present.

Questionnaires have been answered and applications for approval filed by a number of law lists. Further investigation will be made, and, when deemed necessary, hearings will be had. Applications received in time will be ruled in accordance with the Rules and Standards recently adopted by the American Bar Association, of which full notice has already been given, and the lists approved will be made known to the members of the Association before July 1, 1938, the effective date of such Rules and Standards.

Complaints have been received as to the activities of some irresponsible persons approaching prospective listees, and the Committee again suggests that, pending official announcement of lists approved, lawyers contract only with lists they deem to be worth-while and responsible, and then only upon terms that will protect them against loss in event such lists are not approved. Canon 43 of the Canons of Professional Ethics now reads as follows: "Approved Law Lists. It shall be improper for a lawyer to permit his name to be published after January 1, 1939, in a law list that is not approved by the American Bar Association."

Communications should be addressed to Martin J. Teigan, Secretary to the Committee, 209 S. LaSalle Street, Chicago, Illinois.

Proposed Method of Dealing with Contingent Fees

A SPECIAL committee of the Association of the Bar of the City of New York has recently presented a report on the subject of contingent fees. The committee was appointed by Judge Shearn during his term of office and reconstituted by his successor, Col. Stimson.

After referring to previous investigations of accident frauds, and to the apparent failure of the curative measures heretofore adopted, the report says:

"Your Committee has concluded that it is necessary to try a more practical reform than any heretofore seriously attempted. It is obvious that the entire system lives upon its gains and that, if the gains were checked or reduced, and the incentives for undue reward thereby substantially thwarted, a more practical approach would be envisaged. There is no doubt that the amount of the contingent fee, which by custom has become in the large majority of cases the figure of 50% of the recovery, and the method adopted to secure allowances to those who procure the so-called client, are very close to the crux of the entire problem. The speculative factor that so directly gives the attorney an obviously unreasonable partnership in the recovery, and the consequent exaggeration of claims lead not only to obstruction of judicial administration, but bear most heavily upon a class of the population least able to suffer the incubus. Your Committee does not for a moment intend to suggest that the contingent fee be outlawed. It feels clearly that at the present time, at least, there is a social need for its retention, but also that its retention should be conditioned upon the acceptance of certain essential controls."

But when the kind of control came up for consideration, the report says, the committee found that Section 474 of the Judiciary Law (1909) stood right across the pathway. That section provides that "the compensation of an attorney or counselor for his services is governed by agreement, express or implied, which is not restrained by law." The committee concluded that "there is definite and unquestioned need for a new deposit of authority in our courts, and this deposit of authority must come from legislation." It therefore proposed an amendment to Section 474 designed to subject the amount of the contingent fee in personal injury cases to such rules and regulations as shall be promulgated by the Appellate Division of each department and to give such Appellate Divisions the power and discretion to fix its rules and regulations in accordance with the local needs and demonstrated evils in a particular Department.

The proposed legislation, the report adds, also "includes authorization to the Appellate Divisions to deal with like fashion with contingent fee agreements in fields of litigation other than personal injury cases—such for example, as the field of condemnation proceedings—where the Appellate Divisions feel that like treatment in the public interest is called for.

The chairman of the Special Committee is Alfred A. Cook, and the other members are: Abraham Benedict, S. John Block, Bernard Botein, William D. Embree, Edward S. Greenbaum, Nicholas Kelly, Matthew M. Levy, Harold R. Medina and Otto C. Wierum.

The Murals in the National Archives

THE reproduction of the striking mural in the Exhibition Hall of National Archives at Washington, which decorated the first cover page of the February JOURNAL, seems to have attracted a good deal of favorable attention. It is entitled, as will be recalled, "The Constitution of the United States," and portrays James Madison submitting the Constitution to George Washington and the Constitutional Convention. The key to the personages, which could not be printed on the cover and which was inadvertently omitted from another part of the issue, is as follows, from left to right: 1. Edmund Randolph, Virginia; 2. Nathaniel Gorham, Massachusetts; 3. John Dickinson, Delaware; 4. John Rutledge, South Carolina; 5. James Wilson, Pennsylvania; 6. Oliver Ellsworth, Connecticut; 7. Charles Pinckney, South Carolina; 8. James Madison, Virginia; 9. Elbridge Gerry, Massachusetts; 10. William Samuel Johnson, Connecticut; 11. George Mason, Virginia; 12. George Washington, Virginia; 13. Benjamin Franklin, Pennsylvania; 14. Rufus King, Massachusetts; 15. William Paterson, New Jersey; 16. Charles Cotesworth Pinckney, South Carolina; 17. Gouverneur Morris, Pennsylvania; 18. Alexander Hamilton, New York; 19. George Read, Delaware; 20. William R. Davie, North Carolina; 21. John Langdon, New Hampshire; 22. Luther Martin, Maryland; 23. Roger Sherman, Connecticut; 24. Gunning Bedford, Jr., Delaware; 25. Abraham Baldwin, Georgia.

This mural and another, "The Declaration of Independence," printed elsewhere in this issue, are the work of Barry Faulkner. He was commissioned to paint them in 1934, was given two years in which to complete the work, and his compensation was fixed at $36,000. Installation was begun on October 1, 1936, and the murals, having been approved by the Commission on Fine Arts, were formally accepted on Dec. 8, 1936. The portraiture we are told in a leaflet issued by National Archives, has been faithfully based on authentic pictures and busts. "The members of the major committees, such as those of the Continental Congress for a Declaration of Independence and those of the Constitutional Convention on Compromise, on the first draft of the Constitution, and on the final draft—have been grouped together."

Dallas Bar's Remarkable Membership Record

THERE are eight hundred and fifty lawyers in Dallas, Texas, and eight hundred and twenty of them are members of the Dallas Bar Association, according to information received from Mr. William Burrows, second Vice-president of that organization. Furthermore, over twenty-five percent of the members are also members of the American Bar Association, and on Jan. 1 it was qualified to elect a member of the House of Delegates. Mr. Roy C. Ledbetter of Dallas, was chosen to this position. "So far as we know," Mr. Burrows suggests, "ours is the first bar association in a city of the size of Dallas so to qualify.

How did the Dallas Bar effect this remarkable and practically complete organization of the lawyers in that city? At least a partial answer is furnished by an article by Mr. Burrows in the current February issue of the Texas Bar Journal. It is entitled the "Dallas Legal Clinic," and from it we extract the following:

"The most salutary evidence of the effect of the Clinic is the growth of the Association. When the Clinic was inaugurated the membership of the Association was four hundred twenty. Today, a year and nine months later, the membership of the Association is eight hundred and twenty. Dallas has now the third largest City Bar Association in the United States. The American Bar Association Council of the Section of Bar Organization Activities at the 1937 meeting officially reported that the Bar of Dallas is the best organized in the nation, and it is indeed true that practically every Dallas lawyer is a member of the Bar Association. It seems probable that the Clinic is largely responsible for this complete organization.

"Not the least important result [of the Clinic] has been the binding of lawyers together by closer ties of

friendship, which has come from the close association and common study. This has in truth raised the moral and ethical standards of the bar, for it is very difficult for a man to betray his friend. We have found that when lawyers know and understand each other better, the moral standards are higher."

Presentation of Portrait of James Wilson to the Supreme Court of the United States

ON March 2, 1935, the Executive Committee of the Pennsylvania Bar Association appointed a committee composed of Robert Von Moschzisker, former Chief Justice of Pennsylvania; Joseph W. Henderson, of the Philadelphia Bar; and William Draper Lewis, of the Philadelphia Bar, Chairman; to have executed by an artist of note a portrait of James Wilson, a member of the Pennsylvania Provincial Congress and of the Continental Congress, a signer of the Declaration of Independence, an outstanding member of the Constitutional Convention of 1787, and one of the first Associate Justices of the Supreme Court of the United States.

The funds for the portrait were secured by the committee from the members of the Pennsylvania Bar Association. The portrait was executed by the nationally known artist, Robert Susan. The artist completed his work in the fall of 1936. The committee accepted it with very real enthusiasm as not only a notable work of art but a forceful and pleasing representation of Wilson the man.

In order that the portrait could be examined by the members of the Committee of the Supreme Court appointed by the Chief Justice for that purpose, it was sent to the Mayflower Hotel in Washington at the time of the meeting of the American Law Institute last May. The members of the Committee of the Court—Justices Van Devanter, Sutherland, and Stone, saw the portrait and subsequently notified the Pennsylvania Bar Association that it was most satisfactory and acceptable. Later the portrait was returned to Philadelphia and sent to the meeting of the Pennsylvania Bar Association at Bedford Springs last June. In connection with its exhibition there, Ex-Chief Justice Robert Von Moschzisker made a statement on behalf of the Committee and Mr. Robert T. MacCracken, as Chairman of the Constitution Celebration Committee for the Pennsylvania Bar Association, gave an address on Wilson's life and services.

JAMES WILSON, ASSOCIATE JUSTICE OF SUPREME COURT OF THE UNITED STATES (1789-1798)

Reproduction of Painting Presented to the Supreme Court by the Pennsylvania Bar Association

The portrait was also exhibited in Independence Hall, Philadelphia, during the period of the Sesqui-Centennial Constitution Celebration.

During the last part of October, in accordance with prior arrangements, the portrait was sent to the Supreme Court in Washington and on November 2 last, the Chairman of the Pennsylvania Bar Association Committee received a letter from the Chief Justice, reading as follows:

"I have taken pleasure in presenting your letter of October twenty-third to a Conference of the Court. We are very glad to have the fine portrait of Justice James Wilson which has been presented by the Pennsylvania Bar Association. There will be no expense whatever in relation to it and we shall attend to the appropriate wording of the legend to be placed under the portrait or on the frame.

"With kindest regards and warmly appreciating the part which you have had in securing this portrait, I am

"Very sincerely yours,

"CHARLES EVANS HUGHES."

The Committee have also had printed a brochure containing a copy of the portrait and a short history of the life of James Wilson, whose labors during the Revolution would of themselves have entitled him to a prominent position in our history and whose work in connection with the Constitution places him among the half dozen men to whom we owe the Fundamental Law of our Federal State.

WILLIAM DRAPER LEWIS

Washington Letter

PRESIDENT Arthur T. Vanderbilt of the American Bar Association appeared before the Senate Judiciary Committee at a meeting early in February in support of S. 3212, introduced by Senator Ashurst of Arizona, which provides for the creation of an Administrative Office of the United States Courts, with a Director at its head. The bill would add a new chapter, numbered 15, to the Judicial Code.

At that time other prominent members of the Association were heard. Among them were the following: Province M. Pogue, Chairman of the Committee on Jurisprudence and Law Reform; Sylvester C. Smith, Jr., member of the House of Delegates from New Jersey and Chairman of the Committee on Proposals Affecting the Supreme Court and Other Courts of the United States; Herschel W. Arrant, Dean of the Ohio State University Law School and Secretary of the Association's Committee on Professional Ethics and Grievances; Frank E. Atwood, President of The American Judicature Society, member of the House of Delegates, chairman of the Committee on Law Lists, member of one of the associate and advisory committees of the Section on Judicial Administration, and engaged in other work for the Association; and Herbert Harley, Secretary-Treasurer of The American Judicature Society.

All of those appearing before the Senate Judiciary Committee favored the bill in principle although some suggestions were made for changes. One looked toward assuring to each Court appointment of and control over its personnel, especially the Judges' secretaries or other assistants. Another change suggested was to have supervision of the Director of the Administrative Office of the Courts placed otherwise than jointly on the Chief Justice of the United States and the Conference of Senior Circuit Judges, it being thought that this division of supervisory authority could hardly work successfully. Concern was expressed, however, lest duties of this kind be made too much of a burden on the Chief Justice, or require him to divert more of his attention than he would like from his strictly judicial duties on the Court. The status of the bill at this time is that there are likely to be further hearings on it although none are now set. There is no way to tell at this juncture whether it is likely to come up for action at the present session of Congress.

The present bill was considered sufficiently similar to the proposal which carried by a vote of 10,707 to 7,414 in the Association's referendum a year ago, to justify its approval in principle. Question Three of the referendum was: "Should the Congress authorize the Supreme Court of the United States to appoint an administrative assistant, who shall be charged with the duty of watching and reporting as to the calendars and business of all Courts of the United States, with the further duties provided in the bill, the text of which is herewith printed?" The bill referred to was the bill which went to Congress along with the President's famous court message of February 5, 1937, section 3 thereof being devoted to the establishment of the office as suggested in the question just stated.

Attorney General Homer S. Cummings had previously appeared before the Senate Judiciary Committee in support of the measure and he had been followed by several prominent members of the Judiciary.

Under the proposed measure, the Director would "be appointed by, and hold office at the pleasure of, the Supreme Court of the United States." His duties, under the bill as now drafted, are indicated by section 304 which would provide:

"The Director shall be the administrative officer of the United States courts and shall have charge, under the supervision of the Chief Justice of the United States and of the conference of senior circuit judges, of (1) all administrative matters relating to the offices of the clerks and other clerical and administrative personnel of the courts; but nothing contained in this chapter shall be construed as affecting the authority of the Attorney General respecting United States marshals and their deputies, United States attorneys and their assistants and probation officers; (2) examining the state of the dockets of the various courts and securing information as to their needs for assistance, if any; (3) making recommendations to the Chief Justice of the United States respecting the assignment and designation of judges to serve temporarily in circuits or districts other than those for which they were respectively appointed; (4) the disbursement of moneys appropriated for the maintenance, support, and operation of the courts; (5) the purchase, exchange, transfer, and distribution of equipment and supplies; (6) the examination and audit of vouchers and accounts of the officials and employees covered by this chapter; (7) the provision of accommodations for the use of the courts and the various officials and employees covered by this chapter; (8) the preparation of statistical data and reports of the business transacted by the courts; and (9) such other matters as may be assigned to him by the Chief Justice of the United States or by the conference of senior circuit judges. The Director shall, under the supervision of the Chief Justice, prepare and submit to the Bureau of the Budget annually estimates of the expenditures and appropriations necessary for the maintenance and operation of the United States courts and the Administrative Offices of the United States Courts, and such supplemental and deficiency estimates as may be required from time to time for the same purposes, in accordance with the provisions of the Budget and Accounting Act. All estimates so submitted shall be included in the Budget without revision."

Bar Library in Supreme Court Building

One of the most useful services now provided for lawyers who come to Washington is the library for the bar in the new Supreme Court Building. This excellent library, apparently, has not yet come to the attention of many attorneys for it never seems to be crowded with patrons. It will eventually occupy the entire third floor of the building. It is separate from the more modestly appointed library on the second floor for use by the Justices of the Court; but when occasion arises volumes may be borrowed either way between these two collections. The bar library already is a fine place for effective work, and the Librarian, Mr. Oscar D. Clarke, has ideas for further development which eventually will make it more outstanding among the law libraries of the country.

An effective feature is the direct connection with the Library of Congress by means of a tunnel between the basements of the two buildings. This tunnel is amply large for pedestrian traffic and runs below the level of the intervening street. It affords a direct, protected route between the buildings for employees who must make frequent trips for volumes desired. This passage also carries the pneumatic message tubes in operation between the two libraries. Another physical feature of noteworthy convenience in the bar library is the mounting of the volumes of the Digest System on a ready reference rack. The books are mounted in two tiers both of which may be used either from a standing or sitting position. When the reader is seated in a chair, the lower tier provides a sort of desk on which he may lay a pad for taking notes; he thus uses the flat backs of the binders in which

the several volumes are hung. From either tier he swings the desired volume forward where it comes to rest in position for opening and reading. The books are not removable from the rack and therefore may always be found in place. So far as known, only two other libraries at this time have this or a similar system. One is the Yale Law School library, where it is understood the students must stand to use the volumes. The other is the mounting being installed in the new Federal Court Building in New York City.

The bar library in the Supreme Court Building has the usual editions available in a good library such as the federal statutes and reports, the state statutes, digests, and reports, the Reporters System as mentioned, periodicals, and some foreign material. Especially convenient for work on federal tax cases is a valuable set, 45 volumes, of tax laws, regulations, and legislative history, the gift of Mr. Carlton Fox, special assistant to the Attorney General.

The library is open, during the Court's term, on week days from 9:00 a. m. to 10:00 p. m., except that it closes on Saturdays at 1:00 p. m. and all day on legal holidays. During vacation it is open week days from 9:00 a. m. to 4:30 p. m., but closes at 1:00 p. m. Saturdays and does not open on legal holidays. Smoking is permitted in the lounge but not in the reading room. Conference rooms are available for members of the bar of the Supreme Court having cases on the docket or for others by special permission. Library attendants may obtain for patrons stenographic services from the commercial agencies down town.

The plan is, in general, like that of a cathedral. The nave or central space constitutes the reading rooms; and aisles at the sides contain the cases of books. Decoration for the reading room and foyer is provided by woodcarvings of twelve ancient jurists and lawgivers: Draco who appeased the discontent of the people of Athens by codifying their previously unwritten laws, without, however, relaxing any of their severity; Solon who repealed most of these laws thirty years later and gave the Athenians a new, more democratic constitution and certain guarantees of their liberties, all about 600 years B. C. The othen ten carvings are of Romans, Capito and Labeo, the first teachers of law in systematic form and founders of two schools early in the first century A. D.; Sabinus and Proculus, their pupils, and after whom their respective schools were called Sabinian and Proculian; Pomponius, one of the last members of the Sabinian school prior to its disappearance at the end of the second century; Papinian, greatest of the Roman jurists; Paul, the most prolific; Ulpian, the most industrious and influential; Modestinus, the last to succeed to eminence, all of the third century; and finally, Justinian, the emperor whose codification of the laws in 533 A. D. brought together into a coherent body of doctrine the writings of all the others.

WARNING

It has come to the attention of the American Bar Association Committee on Law Lists, that there are several bogus law lists again in the field preying upon the bar.

The usual method of the approach of these racketeers is to be armed with a well gotten up list that is generally a book of some legitimate list with a changed or altered cover; they will claim to have formerly been with an old recognized list, first attempting to collect the entire charge in advance, then making a special concession for whatever they can get.

Lawyers are urged to be on the lookout for these and unless the party or the list is known to make a careful investigation before parting with their money.

Practice of Law in District of Columbia

Both the local and the national phases of the practice of law in the District of Columbia were considered in a recent decision of the United States District Court for the District of Columbia, opinion by Justice Bailey. Merrick, et al. v. American Security and Trust Company.

The Court held that, even in the absence of a statute authorizing it to regulate the practice of law, it has power to regulate such practice in its broader sense "so far as it concerns any legal questions that might necessarily or even probably be passed upon by the court, and to prevent those who are not members of the bar of this court from engaging in such practice or in holding themselves out as authorized to do so." However, the Court saw no reason why the trust company's salaried attorneys could not give advice on questions of inheritance or distribution to those contemplating making the defendant executor or trustee, prepare instruments for such purposes, and file in court papers pertaining thereto, "so long as the advice and conduct of these attorneys are confined to the purpose for which the corporation was chartered, and so long as fees are not collected from the customers to be paid into the treasury of the corporation or charged against the salaries of the attorneys."

It was decided also that the company, in its advertisements, was not holding itself out as practicing law. The opinion recognized that, although, apart from their context, some of the statements in the advertisements, setting forth the advantages of having the company made executor or trustee, might seem to indicate that it "was engaged in the practice of law, I think that, taken as a whole, they are within the limitation of permissible advertisement of its business."

In respect to what might be called the national practice of law in the District, the Court spoke of its being the court of general jurisdiction in the District of Columbia; referred to the United States Supreme Court, the United States Court of Appeals for the District of Columbia, the Court of Claims, the Federal Communications Commission, administrative bodies of a semi-judicial nature like the Court of Customs and Patent Appeals, the different boards of the Patent Office and the various governmental departments, and the Board of Tax Appeals; and then continued:

"Over the practice before these various courts and bodies, this court has no power, nor can it prevent the giving of legal advice as to matters which may come before them or are likely to do so. It results that as to much of the practice of law, both as to its broader and more restrictive sense in the District of Columbia, this court is powerless to act in the absence of statutory authority."

Revenue Branch at Los Angeles

Decentralization of certain work of the Bureau of Internal Revenue is to receive a further test at Los Angeles. As of March 1st, the Commissioner is establishing there a branch of the Bureau, set up in the form of a division of the Technical Staff, and which will consist of accountants, engineers and other tax specialists of the same skill and experience as the men who handle contested cases for the country as a whole in the office of the Commissioner of Internal Revenue at Washington.

(*Continued on page 247*)

OUR MAIN ORDER OF BUSINESS: THE ADMINISTRATION OF JUSTICE

Significance for the People's Faith in Democracy—Criticisms of Delays in Judicial Business and Technicalities in Procedure Have Some Ground in Fact and That Ground Becomes Progressively Greater as We Move from the Highest to the Lowest Courts—Recent Report of Attorney General of the United States Sheds Light on the Subject—Evidences That Genuine Movement for Improvement of Administration of Justice Is at Last under Way—What Has Been Done in the Federal Courts—The Ashurst Bill and the Beneficial Results to Be Expected from Adoption of the Two Fundamental Principles Embodied Therein—Deficiences in the Measure Suggested, etc.*

By Hon. Arthur T. Vanderbilt
President of the American Bar Association

I WOULD like to speak this evening on a topic that should be the major order of business of every bar association. The fact that it has not been may account for the condition of some of our bar associations, a great deal of the criticism of the profession, the popular discontent with the courts, and the undue growth of our administrative tribunals. My topic, of course, is the administration of justice.

One does not have to don the mantle of a prophet nor assume powers of clairvoyance to be able to discern that there are today, as never before, two contending elements struggling for supremacy the world over. The contest is not between Fascism and Communism. At heart they are the same. The contest is between brute force, tyranny, hate and ignorance on the one side, and on the other, the type of civilization we call representative democracy based upon an appeal to reason and intelligence. A glance at the map of the world will reveal the disconcerting fact that the element of force and the agencies of tyranny and oppression seem to have gained the upper hand, in three, if not four, of the five continents.

That our continent has been measurably free from such an infection should be no cause for complacency. The element of force, the appeal to ignorance, and greed for power exist to some extent in every country and every nation, just as unfriendly bacteria exist in every human body. The healthy body is able to control them; the diseased body succumbs to them.

The immediate question that confronts us is whether our body politic is sufficiently healthy to be able to control and neutralize these adverse influences. That depends, of course, on whether or not the democratic and representative principle of government is doing a good job, and, equally important, on whether or not the people at large think it is doing a good job. In any appraisal of the effectiveness of a democratic government, the judiciary are peculiarly subject to attack. In both the nation and in the states, the executive and the legislature are popularly elected. They are the direct representatives of the people. If they make mistakes, the people, in the first instance at least, are inclined to be charitable and forgiving. The judges, on the other hand, assume to be experts, and those who assume to be experts are held to a higher degree of accountability than those who make no such pretensions. Moreover, it is in the courts that the people come face to face with the force of government. The executive and the legislature rarely bring their force to bear directly on the people, but every time a judge makes an order or enters a judgment he does. It is for these reasons that I say that our judges have it peculiarly within their power, more than any other one class, to determine the faith of the people in democracy.

Now there is undoubtedly much current criticism of the courts. Some of it, of course, is inevitable. A losing litigant is inclined to believe the judge unintelligent, if not worse. There is, moreover, the large class of people, especially in times of distress, who are chronically "agin the government". There is the large group of the ignorant who are unable to comprehend what it is that the courts are trying to do. But beyond all this, it must be conceded that there is much ground for the legitimate criticism of our courts and the ground for criticism becomes progressively greater as we move from the highest courts to the lowest courts.

And around what does this criticism center? Not the substantive law, for by and large our system of substantive law is well adapted to the needs of the people. The criticism centers around delays in the disposition of judicial business, technicalities of procedure, and, in some cases, around bad manners on the bench.

Who is to blame for this condition of affairs with respect to procedure in the courts? Light on this problem, so far as the Federal Courts are concerned, is shed by the recent report of the Attorney General. It is worth the reading of any judge or lawyer who would understand the causes of discontent with the law. I don't agree with the Attorney General where he says that the fault does not lie with individual judges. I think the Attorney General was talking the language of diplomacy and not of objective scientific truth when he said that. But we have much to learn from his report. I know, and you know, and every judge knows, that there are judges who are at fault. In my remarks in accepting the Presidency of the American Bar Association at Kansas City, I spoke of those judges who get so far behind with their work that they spend most of their time deciding which cases they will decide and so decide none of them. You would be surprised at the

*Address delivered at the Mid-Winter meeting of the Ohio Bar Association at Columbus.

number of letters that I received from lawyers in various parts of the country congratulating me on my courage in stating an obvious fact and asking me how I came to know of Judge A, or Judge B, or of Judge C, and, in fact, most of the other letters of the alphabet.

But the judges are not the only ones to blame. In Connecticut, for example, where the judges have a tradition of deciding cases in the trial courts within a week and in the Supreme Court within a month, we find that the lawyers take between two and three months to file their pleadings. How the lawyers there learn to work promptly after they get on the bench is one of the unexplained mysteries.

To some extent, of course, human nature being what it is, the law schools are to blame. I say human nature being what it is because I think I am justified in saying that probably 75% of the lawyers, like 95% of the people, rarely get any new ideas after they leave school. If the law schools had but paid as much attention to procedure fifty years ago as they did to the scientific study of the substantive law, we would long ago have had an adequate system of procedure and we would have been spared much of the criticism now directed at the courts and leveled at the profession.

At long last, however, we seem to be approaching a period when a genuine movement for the improvement of the administration of justice is under way. The aspirations of the small group who have labored for years in this field seem about to be measurably realized. Two causes, it seems to me, contribute to this movement. The first is the nation-wide influence of the steps which have been and are being taken for improving the administration of justice in the Federal Courts. The second is the growing competition of the administrative tribunals, the growing competition of the process of administrative justice, as against the justice administered in our traditional courts.

I desire to refer, first of all, if I may to what has been done in the Federal Courts. For more than twenty years the American Bar Association, under the leadership of the late Thomas W. Shelton of Virginia, labored to induce Congress to provide for rules in actions at law similar to the rules in equity and in admiralty, but all in vain. Always we were met by Horatius at the bridge in the person of the late Senator Walsh of Montana. After the Senator's death, Attorney General Cummings, who comes from a state which has a Practice Act so simple that even a high school boy could understand it—and a Practice Act to be effective has to be just as simple as that—espoused the cause of reform in the Federal Courts, and in 1934 Congress passed the appropriate legislation. Pursuant thereto the Supreme Court appointed a distinguished Committee to draft the rules. The Committee has labored for two and one-half years. The rules have been approved by the Supreme Court and have been lodged with Congress. They undoubtedly will become the model that will be followed by many state courts. Students in the law schools will study these rules and will be impressed by them as compared with the involved and troublesome codes which are now in force in many jurisdictions. When this younger generation comes to control the legislatures a few years hence, many of the procedural monstrosities of today will be swept aside and the simpler and more effective provisions of the Federal Rules will be adopted in the several states. The exercise of the rule-making power will become the normal rather than the exceptional method of promulgating procedural law.

But I desire to put myself on record as saying that the new Federal Rules will never be effective by themselves. I have seen some of the finest provisions of a Practice Act and the rules of court adopted thereunder entirely negatived because the judges who were called upon to administer them did not know or understand what the rules were designed to do or were unsympathetic with the purpose thereof. Let me be specific. The Practice Act of 1912 of New Jersey, which was used to some degree, I am told, in the preparation of the new rules, provided for preliminary references so successful in the English practice. The provisions are still on the books, but for years they were quite ineffective because of the attitude of the judges toward their administration. To make the rules successful, the judges and lawyers must go to school. I am willing to hazard the guess that of the 170,000 lawyers in the United States not 10% has yet read the new Federal Rules; I believe that a somewhat higher percentage of judges may have read them but far from 100%. But to be effectively administered, both judges and lawyers must not only have read but they must have studied the rules. They must be studied in the light of conditions that they are designed to remedy. When so studied and so applied they should give us a system of procedure comparable to that in force in the English courts, which has been the admiration of judges and lawyers the world over.

The new Federal Rules moreover, of and by themselves, even if well administered will not render Federal courts efficient. Measurable progress in this direction will be made, however, if the Ashurst Bill (S.3212), providing for the establishment of the administrative office of the United States courts is adopted. This bill, I am advised, was prepared by the Attorney-General, and has administration support. Hearings on it, I am told, will be held next week. The principles of the bill should have the support of every bar association that is genuinely interested in the work of the courts and of every lawyer.

The bill provides for the establishment of an Administrative Office of the United States court, and for a Director at the head thereof, to be appointed by the Supreme Court and to hold office at its pleasure. The Director is given the power to appoint and remove his subordinate officers and employees and to prescribe their duties and fix their salaries. Under the supervision of the Chief Justice and of the Conference of Senior Circuit Judges, he is given charge of the officers and the clerks of all the Federal courts. He is authorized to examine the state of the dockets in the various courts and to secure information as to their needs for assistance, if any. He is authorized to make recommendations to the Chief Justice respecting the assignment and recognition of judges to serve temporarily in other circuits or districts. He is given charge of the purchase of equipment, the audit of disbursements, the providing of accommodations for the use of the court, and the preparation of statistical data with reference to the work of the court along with all such other matters as may be assigned to him by the Chief Justice or the Conference of Senior Circuit Judges. Under the direction of the Chief Justice, he is to prepare and submit to the Director of the Budget the annual estimate for the maintenance and operation of the Federal courts. His audit of accounts and vouchers is to be final.

There are two principles in this Bill of fundamental importance. Heretofore budgets for the court have been prepared by the Attorney-General as part of the budget of the Department of Justice. Likewise, officers and employees of the Department of Justice have audited the accounts and vouchers of the Federal court. Just why the budget and audit of one of three co-ordinate

branches of the government should have been made by a department of another coordinate branch is difficult to understand. At any rate, there can be no question of the fundamental soundness of the proposed change. It should have been made long ago. The Judicial Department should prepare its own budget and be responsible for the administration of the funds entrusted to it.

The second great principle involved in the Bill is just one of plain common sense in the administration of a great business. It recognizes that to obtain effective work in an organization spread over a country the size of ours there must be an administrative head. We got into some very bad habits back in the old frontier days when travel and communication were difficult. Each judge in the administration of his own court became a law unto himself. He ceased to regard himself as an integral part of a great system. Under the Ashurst Bill the Federal courts for the first time are given the necessary personnel and machinery for administering the courts on a coordinated businesslike basis. It now becomes possible for the Chief Justice and the Conference of Senior Circuit Judges to know currently the condition of business in any district or circuit. It now becomes possible, under the limitations imposed by the statute, to move the man-power of the courts where the business of the court most requires it. It now becomes possible to get information about the courts without calling, as heretofore, for the help of a department of another coordinate branch of the national government. With it goes the responsibility for seeing to it that the work of the court is properly and speedily done. This responsibility has always rested upon the courts in the popular mind, but heretofore without any power in the courts to fulfill their responsibility. Great as will be the beneficial results of the new Federal rules, I have no hesitation in saying that equal if not greater results will flow from the adoption of the two principles involved in the Ashurst Bill.

It may seem ungracious to criticize a measure, the principles of which I have so unreservedly praised, but while we are moving forward it seems to me that we should make the greatest advance possible, and I therefore venture to suggest two deficiencies of the pending bill:—

1. The Bill puts the Director of the Administrative Office under the supervision of the Chief Justice of the United States and the Conference of Senior Circuit Judges. This course seems to me objectionable. Dual control in any instance is undesirable. It is particularly undesirable with respect to the Conference of Senior Circuit Judges because the Conference only meets once a year. Obviously, the Conference, with its members spread all over the country, cannot function either legally or effectively by correspondence. Finally, the Director of the Administrative Office will not feel free to act with respect to the Circuit Courts of Appeal if he is subject to their Senior Judges. Proper business organization manifestly requires that the Director of the Administrative Office be placed under the jurisdiction of the Chief Justice of the United States alone.

2. My other suggestion for improving the bill would be to require that the Director of the Administrative Office make a report annually to the Chief Justice. Copies of this report should be furnished to the President, and to the Chairman of the Senate Judiciary Committee and the Chairman of the House Judiciary Committee, as a matter of executive and legislative enlightenment.

The Bill should go even further in providing for reports. Anyone who has had experience with judicial councils or with the collection of judicial statistics knows that annual reports from individual judges are entirely ineffective as a method of control. Every judge should make a quarterly report of the state of his calendar and of his activities to the Director of the Administrative Office. If any trial judge shows a case undecided for more than thirty days after its submission, he should be required to file monthly reports as to all such cases until he decides them. If he continues to be obliged to file such monthly reports for half a year, the Bill should provide that copies of the reports be sent to the Chief Justice, with copies of the reports to the Senate and House Judiciary Committees for the information of these committees and possible action.

I realize that objections will be raised to this suggestion. The first protest will be that the judge has no time for such bookkeeping. The answer to the objection is obvious. First of all, no business can run without bookkeeping, and secondly, the bookkeeping work can be done by the clerk of the court or the judge's secretary.

It may also be urged that this constitutes a reflection on the judges and an affront to their dignity. Here again the answer is obvious. The courts are not instituted to dignify the judiciary, but to decide litigation promptly. The delay in the decision of cases has done more than any one single thing to arouse adverse criticism of the courts. Instances are not wanting in which judges have died leaving hundreds of cases heard but undecided. In one instance the number was over three hundred. Instances are not wanting in which judges have held cases for over three years without deciding them. One case is referred to where the judge, after hearing the case without a jury, discovered three years thereafter that the record was jumbled and thereupon ordered a re-hearing, and then took six months more to decide the case. In more than one instance a mere motion to dismiss has been held for a year and a half or two years. The statutory three-judge court was designed to permit a prompt decision preparatory to a possible appeal to the United States Supreme Court on the question of the constitutionality of a state statute. Instances are not wanting where decisions of such statutory courts have been withheld upwards of a year. The need of frequent reports is so obvious that the principle involved cannot be questioned. Efficient judges will raise no objections to such provisions—indeed they will see the personal advantages to themselves in the making of such reports—and inefficient judges are estopped from raising them.

I have made no attempt to comment on the financial or administrative features of the Ashurst Bill, concerning which I can pretend to no peculiar knowledge. I do venture to assert, however, that with the two changes that I have suggested, the Ashurst Bill would constitute a most important milestone in the development of our jurisprudence worthy to rank with the new Federal Rules.

Both the principle of the Federal Rules (*i. e.*, the delegation of the rule-making power to the courts, or the recognition of its inherent right to make rules) and the principle of the Ashurst Bill, (*i. e.*, the recognition of the need for an administrative head of the court to see to it that it functions in a businesslike way) are as imperatively needed in the state courts as in the Federal courts. One cannot go about the country visiting the various bar associations without being confronted with a strange paradox of the law. Each state borrows with the utmost freedom from the other with respect to the substantive law, but in the field of procedure and of the administration of justice we live in forty-eight mu-

tually exclusive airtight compartments. In the field of substantive law, we are free traders. In the field of procedural law, we have set up high tariffs to protect our provincial prejudices and our insular idiosyncrasies. It seems almost inconceivable that in twenty-eight states of the Union the judge is not allowed to comment on the evidence. It seems almost unbelievable that in twenty-eight different states the judge is not allowed to charge the jury but must submit the instructions furnished him by counsel. It seems almost incomprehensible that in twenty-two different states the judge reads such instructions to the jury before the jury is subjected to a barrage of oratory—first from the defendant's counsel and then from the plaintiff's counsel. How a jury is to remember the law in such cases dazzles the imagination, and yet the strange thing about it all is that even the leaders of the bar in these various states have come to look upon such practices as normal and standard, and they are quite surprised, if not incensed, that anyone should question the rationality of such procedure.

The good example about to be set in the Federal courts should do much to change these things, but to aid in this work the Section of Judicial Administration of the American Bar Association has set up seven distinguished committees dealing with pretrial practice, jury selection, evidence, appellate practice, control of administrative tribunals and judicial organization and management. These committees are hard at work, along with associate advisory committees from each of the states, setting up definite standards of good procedure. These standards, if acceptable to our House of Delegates, should prove as effective in the several states as the standards of legal education and of admission to the bar, and the canons of legal ethics have been in setting up standards for the control of the profession.

These matters must receive our attention if our courts are to function in such a way as to maintain the confidence of our people, and if they are to function in such a way as to preserve the principles of democratic and representative government.

I should have liked also to have discussed with you the effect upon our traditional courts of the competition of our rapidly growing administrative tribunals. Each can learn much from the other. In my state, however, counsel is limited to a half-hour for the making of an argument, and I sense the approach of the deadline. Suffice it to say, therefore, that what is most needed in our judicial tribunals is more administration, and what is most needed in our administrative tribunals is more respect for the fundamentals and essentials of the judicial function. Both must come and come within a reasonable time if our law-expounding bodies are to do their full duty by the people, and if they are to maintain the full confidence of the people.

Psychiatry and Criminal Justice

While medical science, including particularly psychiatry and mental hygiene, has an unquestionable place in any attempt to evolve a more exact criminal justice, its role is nevertheless much more limited than early promises made on its behalf have led many to expect, according to conclusions based on the results of an experimental clinic conducted at Yale University for the past six years. Professor George H. Dession of the Yale Law School, in the current issue of the Yale Law Journal states that "one must venture beyond the realm of medical science and of psychology and seek sanctions or justifications which they cannot supply, in an effort to determine not merely what can be done with a given offender as a practical matter of the moment but even what should be done with him under more satisfactory hypothetical conditions.

"The psychiatrist may be able to describe a given offender," Professor Dession continues. "He may shed considerable light on the factors which conditioned his development and present state. It is within his province to indicate to what extent the offender may prove amenable to treatment, and to what kind of treatment. For the offender is a human being—and therefore like and in the same sense as other human beings, a problem for the psychiatrist. But there existing science stops. What varieties of personality the community shall take the trouble to maintain even though they have demonstrated their inability to get along with the group, what individuals it shall undertake to rehabilitate at public expense, what forms of treatment shall be made available, what types of special environment shall be created for the purpose, and how any given program shall be set up, are primarily questions of social values and of politics very much akin to such major issues of recent years as those raised by unemployment and the care of the aged."

Professor Dession points out that despite the fact that the participation of the psychiatrist in criminal cases is no longer a novelty, "no one state has yet conducted a thoroughgoing experiment to demonstrate what may be expected from routine psychiatric diagnosis, treatment board sentences and institutional therapy within the framework of existing channels of disposition."

Arrangements for Annual Meeting, Cleveland, Ohio

July 25-29, 1938

HEADQUARTERS—HOTEL CLEVELAND

Hotel accommodations, all with bath, are available as follows:

	Single for 1 person	Double (dbl. bed) for 2 persons	Twin beds for 2 persons	Parlor Suites
CLEVELAND	$2.75 to $4.50	$4.50 to $6.50	$6 to $10	
ALLERTON	2.25 to 3.50	3.75 to 5.00	4.50 to 6.00	7 & up
AUDITORIUM	3.00 to 3.50	4.50 to 5.00	6 to 7	
CARTER	3.00 to 5.00	5.00 to 7.00	7 to 10	12 & up
HOLLENDEN	3.50 to 7.00	5.00 to 7.50	6 to 12	12 & up
STATLER	3.00 to 6.00	4.50 to 8.00	5 to 8	10 & up

Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two persons*.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating hotel desired, number of rooms required and rate therefor, names of persons who will occupy the same, and arrival date, including definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Executive Secretary, 1140 N. Dearborn St., Chicago, Illinois.

FEDERAL TAXATION—1938

Developments of Income Tax during Past Twenty-five Years Afford an Excellent Index to Reforms Which May Be Anticipated in Succeeding Quarter Century—Consideration of Part Played by Federal Courts and by Congress, Respectively, in Development of Tax—Four Broad Classes into Which Legislative Provisions and Judicial Decisions May Be Grouped—Possibilities of Simplification and Improvement—Major Topics Now under Consideration by Treasury Department as Part of Broad General Program for Revenue Revision—Elimination of Exemptions—Business with Fluctuating Income—Taxation of Corporations—Capital Gains and Losses—Integration of Federal and State Taxing Systems*

By Hon. Roswell Magill
Under-Secretary of United States Treasury

JUST 25 years ago, on the 25th of February, 1913, the Secretary of State certified that the income tax amendment had been ratified by the requisite number of States and had, therefore, become part of the Constitution. Eight months later the first income tax act was passed effective as of March 1, 1913. Hence, it is fitting for the Association of the Bar to devote a February evening to this bit of recent legal history. It is my purpose not to discuss history for its own sake, but as a forecast of things to come.

Although Mr. Joseph H. Choate denounced the income tax law of 1894 as "communistic in its purposes and tendencies,"[1] the final approval of the Sixteenth Amendment in 1913 does not seem to have been attended with quite as great misgivings. The income tax had wormed its way into the Federal statute books in 1909,[2] in the form of an excise tax on corporations, measured by income; and no calamities had yet befallen the land. Doubtless the Amendment would have caused a much greater outcry in 1913 had there not been a general misapprehension of its probable consequences. It seems to have been thought that Federal income taxation would provide a relatively small supplemental source of revenue, primarily for use in times of national emergency, such as war. Its subsequent major importance in the Federal fiscal system was apparently not foreseen.

During the first few years the original humble expectations proved correct. The total income tax collections for the fiscal year 1913-14 amounted to $71 million out of total ordinary receipts of $735 million. Customs duties and miscellaneous internal revenue taxes provided nearly 82 per cent of the total ordinary receipts required to support the Federal Government. Much the same situation prevailed in the following two years, but beginning in 1917 the income tax was called upon to bear a much larger share in meeting the increased expenses of the Government and from that day to this it has assumed first place among the Federal sources of revenue. During the current year the income tax will provide over 40 per cent of the total revenues as against less than 10 per cent in 1913-14; although customs receipts in the meantime have increased in yield by two-fifths and miscellaneous internal revenue taxes (exclusive of social security taxes) have increased sevenfold.

Fiscal experts seem to agree that the Federal Government should gradually give up a good part of the consumption taxes which it now levies in favor of increased use of the income tax, a point of view which I heartily share. Since the tax, therefore, appears to have the future before it, it is profitable to consider what that future is likely to be. The developments of the past 25 years are an excellent index to the reforms which may be anticipated in the succeeding quarter century. Moreover, it is especially interesting to consider the part which has been played by the Federal courts and by the Congress, respectively, in the development of the tax. These two branches of our Government, even more than the tax administration itself, have shared in laying the foundation upon which the present structure of the income tax has been erected. Or perhaps it might better be said that the Judiciary has laid the foundation and the Congress has erected the superstructure. The foundation is relatively resistant to change and remodeling; the superstructure has been greatly modified and extended with the years. I think it may be well to vary the usual textbook treatment of the whole subject by keeping these two courses of development, the legislative and the judicial, entirely separate.

I.

Attention is frequently directed, and properly, to the increase in sheer bulk of the income tax law. The income tax sections of the Tariff Act of 1913 ran to 17 pages; the income tax sections of the Revenue Act of 1936 to 95 pages. This is not the whole story, for many additional provisions are contained in other acts which have been left in effect. Commentators also remark upon the frequency with which new revenue laws have been adopted, particularly in recent years. Since 1934 every year has seen a new revenue act; and during the quarter century of Federal income tax history there have been 13 revenue laws, aside from sundry amendments contained in other acts. Not only is there much more for a lawyer or business man to read today than in 1913, but it is increasingly difficult to discover precisely what was the provision applicable to a particular transaction occurring at a particular time in the past. Moreover, the provisions themselves have gradually increased in complexity so that it is not difficult for columnists to amuse their readers by quoting what is to

*Address delivered before Association of the Bar of the City of New York February 8, 1938.

1. Argument in Pollock v. Farmers' Loan and Trust Co. 157 U.S. 429,532 (1895).

2. Corporation Excise Tax Act of 1909 (36 Stat. 11, 112).

them a wholly inexplicable and unintelligible conglomeration of words. This situation is chalked up to the sheer perversity of Treasury officials, legislative draftsmen, and members of Congress. Many of them, being lawyers, like to make things look harder than they are. The income tax is their particular playground.

I would be the last to urge that the income tax law is incapable of simplification, and I believe that even a codification of existing provisions would be an enormous improvement over the present somewhat confused situation. On the other hand, even a few minutes study of the sections which have gone into the law since 1913 will convince anyone that a return to a seventeen-page income tax law is quite as unlikely as a return to the horse and buggy era. What provisions are on the pages which have been added in 25 years to the basic law? There is quite a welter of them, but for purposes of broad generalization they can roughly be grouped into four classes. In a general way these four lines of development have followed one another chronologically.

1. In the first place, there has been a series of provisions designed to establish more detailed rules for dealing with all or particular kinds of income. Thus, a number of sections have been inserted on the subject of methods of accounting and of accounting periods;[3] the 1913 law was drawn by lawyers who were not particularly familiar with accounting distinctions. Other explicit provisions of this character are those dealing with the taxation of installment sales[4] and with inventories;[5] the distinctions between various kinds of corporate distributions;[6] and the sections defining the kinds of incomes of non-resident aliens which will be taxable in this country.[7] Finally, the laws since 1921 have been burdened with long sections, prescribing various methods of solving that most vexatious problem, the taxation of capital gains and the deduction of capital losses.[8]

Many of these provisions, if not most of them, are intended primarily to give the taxpayer more favorable or more equitable treatment than he could expect on the basis of the original general provision. Recent newspaper discussions give no hint of the fact that for 8 years capital gains were fully taxable as ordinary income in the year of realization, and would still be so taxable, at much higher rates than are actually applied, were it not for the several pages of special treatment which the Congress has provided.[9] Dividends from corporate surplus accumulated prior to March 1, 1913, would be taxable like dividends from current earnings,[10] were it not for a special exemption provision.[11] Finally, the various accounting provisions[12] are doubtless intended to bring the law more nearly into conformity with customary business practice, a desirable end as all would agree. Although this group of provisions has increased the bulk and the complexity of the law, few would want to dispense with them at this time. No doubt some of you, however, would like to try your hands at drafting simpler substitutes and I should be glad to have you do so.

2. A second major group of provisions developed during the quarter century are those providing additional exemptions and deductions. The 1913 Act was by no means a tax on gross income,[13] nor was the base especially broad.[14] Most of our present deduction provisions found a place in some form in the original Act.[15] There was a considerable list of exempt corporations,[16] all of which have, I believe, retained their exempt status from that day to this.[17] Nevertheless, the years have suggested additional possibilities. Thus, the present depreciation and depletion allowances,[18] and the present deduction for interest[19] in the case of corporations are far more liberal than they were in 1913. There was no deduction for charitable contributions in 1913;[20] no earned income credit;[21] and no foreign tax credit.[22] China Trade Act corporations had not yet commenced to steer an elusive course through the statute books[23] and incomes from sources within United States possessions were given no special attention.[24] Not until 1924 was the system of tax-free exchanges, particularly in corporate reorganizations, fully worked out.[25]

Exemption provisions have a delusive appeal to sentimental Americans. It does not readily occur to us that, with a relatively large tax burden to be borne by a limited number of taxpayers, the exemption of one group or of one type of income necessarily involves something of an increase in the burden to be borne by other groups of taxpayers or by other types of income. Moreover, exemptions once in the law are extremely difficult to remove against the concentrated objections of the particular group which has enjoyed the benefit. The Treasury has tried for years to eliminate various exemptions and deductions which Secretaries of the Treasury of both political parties have regarded as unjustifiable. Nevertheless, they remain in the law. It would be possible to lower the basic rates of tax somewhat were some of these exemptions and deductions removed; and some day this economic incentive may bring changes that abstract arguments have not yet effected.

3. A third series of additions to the law has been a group of sections intended to perfect its administration. Some of these may be regarded as operating in favor of the taxpayer and some in favor of the Treasury. The income tax was grafted on the existing system for the collection of internal revenue through collectors scattered over the country. If the taxpayer thought that the collector was exacting an excessive amount, in some cases he could secure an injunction in the Federal courts; but ordinarily he had to pay the tax and then sue to recover, just as he does today in the case of the miscellaneous internal revenue taxes. To this system has been added a long series of provisions for the determination of deficiencies by the Commis-

3. Revenue Act of 1936, secs. 41-43, inc., 45-47, inc., and 48(a) (b) (c) (49 Stat. 1648, 1666).
4. Sec. 44 (Id. at 1667).
5. See sec. 22(c) (Id. at 1658).
6. See sec. 115 (Id. at 1687).
7. See sec. 211 as amended by Sec. 501, Revenue Act of 1937 (Id. at 1714 and 50 Stat. 813, 830); secs. 212, 219, 231, Revenue Act of 1936 (49 Stat. 1715-1717); sec. 119 (Id. at 1693).
8. Secs. 111, 112, 113, 117, 118 (Id. at 1678-1686, 1691-1693).
9. Sec. 117 (Id. at 1691).
10. Under Lynch v. Hornby, 247 U.S. 339 (1918).
11. See sec. 115 (b), 1936 Act.
12. Supra, note 3.
13. See sec. II, par. B. and G., 1913 Act (38 Stat. 114, 166, 167, 172).
14. See sec. II, par. C. (Id. at 168).
15. Compare sec. II, par. B and G (b) (supra, note 13) with sec. 23, 1936 Act (49 Stat. 1658).
16. Sec. II, par. G(a) (supra, note 13).
17. Sec. 101, 1936 Act (49 Stat.. 1673).
18. Secs. 23(l) and (m), and 114, 1936 Act (Id. at 1660, 1686).
19. Sec. 23(b), 1936 Act (Id. at 1659).
20. See 1936 Act, secs. 23(o) (q) and 120 (Id. at 1660, 1661, 1695).
21. 1936 Act, sec. 25(a) (3) and (4) (Id. at 1663).
22. See 1936 Act, secs. 31 and 131 (Id. at 1666, 1696).
23. See secs. 261-265, 116, 1936 Act (Id. at 1720, 1689).
24. 1936 Act, sec. 251 (Id. at 1718).
25. Secs. 203 and 204, Revenue Act of 1924 (43 Stat. 253, 256); see also secs. 11 2and 113, 1936 Act (49 Stat. 1678).

sioner with the right to the taxpayer to appeal to the Board of Tax Appeals without payment of the tax.[26] The implications of this change are indicated by the facts that there are now many more appeals to the Board each year than there are suits commenced in the Federal courts, and that several hundred millions of dollars in proposed additional assessments are held up until the cases can either be settled or heard. We now have several systems for judicial review of tax determinations existing side by side: possible suits against the various collectors, against the United States, and against the Commissioner, with possible jurisdiction in the Board of Tax Appeals, Federal district courts, and the Court of Claims. There are four different kinds of proceedings; eighty-seven different tribunals in which to bring them; and twelve different appellate courts. Since appeal to the Supreme Court does not lie as a matter of right, it is not surprising that the correct solution of many issues is unknown or uncertain, with a flood of decisions, regulations and rulings to be consulted. Some form of simplification and consolidation of these different types of proceedings and appeals is clearly called for. The next 25 years ought to see it worked out.

4. The fourth and final series of provisions deals with the prevention of tax avoidance. Americans are an ingenious race; and apparently the same ingenuity which among engineers finds its outlet in mechanical inventions, among lawyers takes shape in a trust revocable after notice of a year and a day; in a personal holding company organized under the laws of Newfoundland or the Bahamas; or in a tax sale by an individual to a trust which he has created and of which he is trustee. Possibly all of these devices would have been forestalled in time by the development of a different set of standards by lawyers and taxpayers themselves, for it is difficult to believe that our citizens generally adhere to the view reported to have been expressed by one of them—"If the Government doesn't know enough to collect its taxes, a man is a fool to pay them." On the other hand, so long as that view is current among a considerable minority and a minority to which a considerable part of the community looks for guidance, the Government must necessarily make its statutes sufficiently knowledgeable to meet the minority on its own ground. Consequently, there have been added to the law perhaps its most lengthy and involved sections to meet the problems of foreign personal holding companies,[27] of tax losses between members of a family,[28] and of the different types of trusts[29] with artificial provisions for tax purposes that a Lord Eldon or an Ames or a Gray would never recognize.

II.

During the quarter century, the Judiciary has been quite as busy as the Legislature; indeed, tax questions have commanded a higher percentage of judicial time than of congressional. We now have over 4,500 Federal court decisions on the subject of Federal taxation, and in addition, the Board of Tax Appeals has issued 8,500 published opinions and 4,000 unpublished memorandum opinions in its fourteen-year history. It is *not* surprising that an exhaustive treatise on the income tax alone runs to 6 volumes, with supplements totalling nearly 2,000 pages additional.[30] It *is* surprising that anyone should undertake to summarize all this work in a few sentences. To sharpen the focus, and to keep the task within human capacity, I shall limit myself to the decisions of the Supreme Court only, omitting the useful and important decisions of the Board and the lower Federal courts. Moreover, I can hardly do more than suggest the principal characteristics of the decisions. To report their substance and their color requires much more time and space than I have here.

A general survey of these decisions leads to the primary conclusion that the Court has been doing much the same types of work as has the Congress, though the forms of procedure are, of course, very different. In some groups of decisions, such as those dealing with corporate distributions[31] and with reorganizations,[32] the Court has worked out broad policies capable of application far beyond the particular controversy. The statutory provisions upon which the reorganization decisions were based have long since been repealed; but their philosophy is still vital and controlling, as the Court told us not long ago in the *Koshland* case.[33] In other groups of decisions, such as those dealing with accounting methods[34] and with the treatment of gifts and annuities,[35] the Court has filled in details which the Congress did not see fit to embody in the statute itself. To use my earlier figure, after the Supreme Court completed the foundation of the structure, it helped Congress put on the siding and the roof.

In discussing the decisions of the Supreme Court in this field, it is quite possible, as well as convenient, to use the four subdivisions just applied in classifying the mass of legislative changes. On this basis, the decisions of the Court since 1913 may be broadly grouped under four headings: (1) the formulation in detail of the items which constitute income and of accounting methods to be used in reporting them; (2) decisions relating to exemptions and deductions; (3) decisions relating to administrative procedure; and (4) decisions relating to the prevention of tax avoidance.

1. Although Congress has purported to define income in each of the revenue acts, the definition has comparatively little value in specific cases on account of its vague generalities. Indeed, the Congress might have been wiser to have stated outright that the income taxable under the revenue acts is whatever income the Congress is authorized to tax under the Sixteenth Amendment. The Supreme Court has filled in many details in the definition of income; and at the same time in its opinions has given us an explicit, well integrated philosophy of the subject worthy of the attention and respect of economists as well as of lawyers. There is probably no other source from which a student may obtain so thorough a discussion of the nature of income and of the particular items which constitute taxable income. It is the Supreme Court and not the Congress which has pointed out that income must be realized before it can be taxed;[36] and it is the Court

26. Secs. 271-312, inc. (Id. at 1721).

27. Revenue Act of 1937, Title II (50 Stat. 813, 818).

28. Sec. 24(a) (6), 1936 Act (49 Stat. 1662), as amended by sec. 301, 1937 Act (50 Stat. 827).

29. See Revenue Act of 1936: sec. 142 (49 Stat. 1700) as amended by sec. 402, 1937 Act (50 Stat. 829); secs. 161, 162 (49 Stat. 1706); sec. 163 (Id. at 1707), as amended by sec. 401, 1937 Act (50 Stat. 829) secs. 166, 167 (49 Stat. 1707).

30. Paul and Mertens, Law of Federal Income Taxation.

31. See Magill, Realization of Income Through Corporate Distributions, 36 Col. L. Rev. 519 (1936); Ch. 2, *Taxable Income* (1936).

32. U. S. v. Phellis, 257 U.S. 156 (1921); Rockefeller v. U.S. 257 U.S. 176 (1921); Cullinan v. Walker, 262 U.S. 134 (1923); Weiss v. Stearn, 265 U.S. 242 (1924); Marr v. U.S., 268 U.S. 536 (1925).

33. Koshland v. Helvering, 298 U.S. 441 (1936).

34. See Magill, When is Income Realized?, 46 Harvard L. Rev. 933 (1933); Ch. 5, *Taxable Income*, and cases therein cited.

35. See Ch. 11, *Taxable Income*, and cases therein cited.

36. Eisner v. Macomber, 252 U.S. 189 (1920).

that has described in detail what events constitute realization. The series of cases dealing with corporate distributions, headed by *Eisner* v. *Macomber*[37] and for the moment terminated with *Koshland* v. *Helvering*[38] and *Helvering* v. *Gowran*,[39] brought out that gain need not be realized in money to be taxable, but may also arise from the receipt of property having an exchangeable value. It must appear, however, in the case of a corporate distribution, that the stockholder has obtained a new interest in property differing either in kind or in extent from that which he had before. Because of the technical character of the income tax under our constitutional system, the tax can be measured by gross income as distinguished from net income; the taxpayer appears to have no constitutional right to deductions.[40] On the other hand, income does not mean gross receipts; the taxpayer is entitled to deduct the cost of goods sold.[41] Not every increase in the taxpayer's economic worth is income, even though realized in cash or valuable property. A gift of the corpus of a fund is not income to the donee,[42] but a gift of the income of a donated fund as well as the profits realized by the sale of the donated property are income to him.[43]

These decisions lead to results as admirably adapted to practical administrative necessities as they are distinct from many economists' conceptions of what income should be.

The Court has not been so happy perhaps in the field of accounting distinctions. The *North American Oil Consolidated* decision[44] seems to overemphasize somewhat the receipt of the money as a significant factor in the determination of the time of realization of income, in holding that income may be realized, although it is the subject of litigation, and may have to be repaid in full. The *North Texas Lumber Company* decision[45] disapproves of accounting for the profit from a sale in the year in which the taxpayer had obtained the valid obligation of a solvent vendor, in favor of the later year in which title actually passed. Since the only act remaining to be performed by the vendor was the formal execution of a deed, the Court seems hardly justified in saying that the seller's method of accounting, whereby the income was reported in the prior year, clearly did not reflect its income. The Court had difficulties with the cases involving the discharge of indebtedness for a lesser amount than that borrowed, the final conclusion being that the difference between the sum borrowed and that paid in discharge is income.[46] This result is satisfactory in the ordinary case of purchase of his obligations by a solvent debtor, though it seems subject to qualification when the debtor is actually or potentially insolvent.[47]

2. The income tax era began with a general declaration that the Congress should have the power to tax incomes from whatever source derived. The Congress at once set up its series of exemptions and deductions, carving out areas in which it did not choose to exercise its power. The Supreme Court in an important group of decisions has followed a parallel course of action, likewise carving out exceptions and limitations from the constitutional grant of power. To be sure, the limitations established by the Court were essentially limitations upon the action of Congress, but as one result of the doctrine of precedent, they apply almost as forcefully to the Court itself. Thus, the Congress in the first three income tax laws[48] granted a specific exemption to the salaries of State and municipal officers and employees. Of course, the Congress could at any time repeal the statutory exemption; and in due course it proceeded to do so. The Court early indicated its view that the Sixteenth Amendment did not extend the taxing power to new subjects;[49] and thus, that the phrase "incomes from whatever source derived," as used in the Amendment, did not include State officers' salaries previously regarded as exempt. The Court is by no means so ready as the Congress to reverse a previously determined course of action, even though events may have shown the wisdom of reversal. Hence, the Federal courts in this instance have been engaged for years in the almost completely unprofitable task of determining what sort of municipal street railway employees, of waterworks engineers, of school teachers, or of harbor pilots are free from the Federal income tax that other citizens pay on like salaries.[50] Probably most lawyers and most other members of the community are now satisfied that it would be wiser policy to apply the income tax equally against all. Yet the Court may be loath to reverse its long-established determination of this constitutional limitation, now buttressed by many succeeding decisions; and Congress may not feel free to do so, save through the cumbersome process of constitutional amendment.

Much the same can be said of the other major exemption established by the Court, respecting the interest on State and municipal bonds;[51] and of the special privilege granted to spouses in community property states, each to report half the other's income,[52] notwithstanding the general rule, applicable in the other forty States, that income is taxable to the one who earns or owns or controls it.

3. In the field of administrative procedure the Court has pointed out that if an appeal from the Commissioner's action is taken to the Board of Tax Appeals, the scope of the review, at least in some cases, will be broader than if the Commissioner's actions are under consideration by a Federal court.[53] These decisions involve the somewhat unique special assessment provisions of the old excess profits tax law;[54] and, consequently, their application to more recent grants

37. Supra, note 36.
38. Supra, note 33.
39. Decided Dec. 6, 1937.
40. See Magill, *Taxable Income*, Ch. 9 and 12.
41. Id.
42. Supra, note 35.
43. Supra, note 35.
44. North American Oil Consolidated v. Burnet, 286 U.S. 417 (1932).
45. Lucas v. North Texas Lumber Co., 281 U.S. 11 (1930).
46. See Bowers v. Kerbaugh-Empire Co., 271 U.S. 170 (1926); U.S. v. Kirby Lumber Co., 284 U.S. 1 (1931); Helvering v. Am. Chicle Co., 291 U.S. 426 (1934).
47. See Magill, *Taxable Income*, pp. 226-229.
48. 1913 Act, sec. II, par. B. (38 Stat. 167, 168); 1916 Act, sec. 4 (39 Stat. 756, 758, 759); 1917 Act. sec. 1200, Title XII (40 Stat. 300, 329, 330).
49. Brushaber v. Union Pacific R.R. Co., 240 U.S. 1 (1916); Stanton v. Baltic Mining Co., 240 U.S. 103 (1916); Peck & Co. v. Lowe, 247 U.S. 165 (1918); Evans v. Gore, 253 U.S. 245 (1920).
50. A recent case is Brush v. Com'r., 300 U.S. 352 (1937).
51. See Magill, The Problem of Intergovernmental Tax Exemption, 15 Tax Magazine 699 (1937), and cases therein cited.
52. Poe v. Seaborn, 282 U.S. 101 (1930); Goodell v. Koch, 282 U.S. 118 (1930); Hopkins v. Bacon, 282 U.S. 122 (1930); Bender v. Pfaff, 282 U.S. 127 (1930); U.S. v. Malcolm, 282 U.S. 792 (1931).
53. Blair v. Oesterlein Machine Co., 275 U.S. 220 (1927); Williamsport Wire Rope Co. v. U.S., 277 U.S. 551 (1928); see Magill, Finality of Determinations of the Commissioner of Internal Revenue, 30 Col. L. Rev. 147 (1930).
54. Revenue Act of 1918, secs. 327 and 328 (40 Stat. 1057, 1093).

of power to the Commissioner is not wholly clear. Probably somewhat the same distinctions will be made with respect to existing law, but it is not yet clear how far the Commissioner's action is, or can be made, final in cases of particular administrative determinations. Here lie the seeds of a possible major growth of administrative power during the next 25 years, a power now exercised by other officers.

4. The Supreme Court's work in the field of tax avoidance has been quite as important as the work of the Congress. The cases of family settlements, involving revocable trusts,[55] insurance trusts,[56] and trusts for the support of wife and children;[57] and the cases denying tax effect to assignments of income,[58] were not only useful supplements to recent legislation on the same topics, but to a considerable degree have made unnecessary detailed legislation to prevent tax avoidance. *Gregory* v. *Helvering*[59] is an additional landmark in the general crusade against artificial transactions for tax purposes only; and has just been supported by Mr. Justice Sutherland's last opinion in the *Minnesota Tea* case.[60] The importance of these decisions can hardly be exaggerated, since the philosophy which they express has not only become the law of the land in the particular cases, but has also set minimum standards of conduct between the taxpayer and the Treasury, applicable to the whole field of Federal taxation. It is good discipline for a lawyer to read at least twice a year two sentences from Mr. Justice Holmes' opinion in *Lucas* v. *Earle*:[61] " . . . There is no doubt that the statute could tax salaries to those who earned them and provide that the tax could not be escaped by anticipatory arrangements and contracts however skillfully devised to prevent the salary when paid from vesting even for a second in the man who earned it. That seems to us the import of the statute before us and we think that no distinction can be taken according to the motives leading to the arrangement by which the fruits are attributed to a different tree from that on which they grew."

A similar sentence from the pen of the same judge appears in *Corliss* v. *Bowers*:[62] " . . . The income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not."

III.

My purpose in surveying the last 25 years was in large part to establish a datum point from which we might view the possibilities of the next 25 years. When we consider the great output of revenue laws and decisions interpreting them, our conclusion must be that the Federal revenue system has been quite responsive to the demands both of taxpayers and of the Treasury. In a recent comment upon the undistributed profits tax, an English journal[63] remarked upon the desirability of repealing taxes with which taxpayers are generally dissatisfied. Probably this is an unattainable ideal. What taxes are there which we are glad to pay? Nevertheless, taxpayers can take comfort in the fact that a great part of the amendments to the income tax law have been designed primarily for their benefit in cases in which the Congress believed that the previous general rule was operating inequitably.

For these reasons, among others, the simplification of the income tax law itself through the repeal of unnecessary provisions does not appear very likely in the immediate future. The Federal revenue system as a whole could be simplified by the elimination of many of the consumption taxes and the substitution therefor of increased reliance upon the income tax and the estate tax. This very course of action, however, would be likely to result in more rather than less relief provisions in the income tax itself.

Again it is often suggested that the income tax could be largely improved by a restatement of its major provisions in the form of general rules with a succession of explicit exceptions. Some progress of this sort is probably possible and desirable. Moreover, there is a real possibility that the administrative provisions of the revenue laws can be restated and codified. Indeed, the Treasury has already embarked upon this task. Many of the administrative provisions are of long standing and have been the subject of repeated interpretations by the courts. To restate them in better form is a lengthy and arduous task. The principal difficulty in projects of statutory revision is that highly trained technicians who can do the job are comparatively few, and their time is normally completely occupied with the day-by-day demands for current amendments to the law. Possibly an independent commission on the codification of the income tax law could be utilized here as it has been in England.[64] The work of the commission for the most part would not be the recommendation of spectacular changes, but the much more tiresome chore of restating existing laws applicable to complex business and social conditions in the light of a multitude of court decisions. The British Commission took over 8 years to complete its work and the Parliament has not yet adopted the code it recommended.

At the time of my recent appearance before the Ways and Means Committee to discuss the recommendations for revenue revision proposed by the subcommittee, I mentioned a number of the major topics which are now under consideration in the Treasury as part of a broad general program for revenue revision.[65] It may be interesting to this audience if I repeat and amplify some of these topics.

1. As I have already indicated, the elimination of any exemption, whether inserted in the law by the Congress or imposed upon Congress by the Supreme Court, cannot readily be accomplished. If the Court has outlined the exemption, as in the case of the interest upon State and municipal bonds and the salaries of State and municipal officials, it is normally impossible to eliminate it save through a constitutional amendment. The arduous course which a constitutional amendment must follow before adoption is too well known to all of you to require repetition. Unless the public demand for an amendment is most insistent,

55. Reinecke v. Smith, 289 U.S. 172 (1933); Corliss v. Bowers, 281 U.S. 376 (1930).

56. Burnet v. Wells, 289 U.S. 670 (1933); Dupont v. Com'r., 289 U.S. 685 (1933).

57. Helvering v. Schweitzer, 296 U.S. 551 (1935), rehearing denied 296 U.S. 665 (1936); Helvering v. Stokes, 296 U.S. 551 (1935), rehearing denied 296 U.S. 665 (1936); Willcuts v. Douglas, 296 U.S. 1 (1935).

58. Lucas v. Earl, 281 U.S. 111 (1930); Burnet v. Leininger, 285 U.S. 136 (1932).

59. 293 U. S. 465 (1935).

60. Minnesota Tea Co. v. Helvering, decided Jan. 17, 1938.

61. 281 U.S. 111, 114 (1930).

62. 281 U.S. 376, 378 (1930).

63. United States Taxes on Company Profits, Midland Bank Monthly Review (December 1937-January 1938).

64. See Report of Income Tax Codification Committee, presented to Parliament in April, 1936.

65. Hearings before the Committee on Ways and Means, House of Representatives, 75th Congress, 3rd Session, on Revenue Revision, 1938, pp. 100, 111.

there is little likelihood as a practical matter that the proposition will in fact be adopted. Secretaries of the Treasury, both Republicans and Democrats, have unanimously urged for many years that the interest on future issues of State and municipal bonds should be subjected to Federal taxation and the interest on future Federal issues to State income taxation. Dozens of proposals for constitutional amendments have been introduced into Congress, but we are little further along with the solution of the problem than we were 15 years ago. Nevertheless, the Treasury still strongly urges the change.

On the other hand, a change which has been inserted by Congress can in theory be repealed by Congress with equal ease, when public opinion and the needs of the times appear to demand. In practice, the group affected always provides vigorous opposition to any proposal for the elimination of an existing exemption, and sometimes misrepresentation both of the proposal and of the results which would follow. Frequently the general public cannot understand the technical issues involved; and hence takes no active interest in reform. In his message of June 1, 1937,[66] the President urged that the allowance for depletion in the case of mines, and oil and gas wells should be limited in total amount to the cost of such properties, as is true of other similar allowances to other taxpayers. If this change were made, such companies would be put on an equal basis with other corporations, many millions of dollars of additional revenue would be secured, and consequently the general rates of tax could be lowered or other concessions made in favor of the general tax-paying public.

2. The revenue acts in recent years have not taken sufficient account of the fact that some businesses do not show a steady flow of income year after year, but rather report high incomes in some years of prosperity and deficits in other years. The result may well be that a hazardous business is more heavily taxed than a well established enterprise with a steady income year in and year out. To meet this situation in part, the Ways and Means subcommittee on tax revision has recommended a limited carry-over for net operating losses.[67] In my opinion these provisions should be extended as the revenues permit in order that the businesses with fluctuating incomes may be taxed on a substantial equality with businesses with steady incomes.

3. The whole subject of the taxation of corporations and their shareholders requires additional study, notwithstanding the great amount of attention which it has received in the past two years. We started out in 1913 with a normal tax on corporation income imposed at the same rate as the normal tax on individual income.[68] As the years went by, the corporation normal tax rate has been gradually increased from one per cent to a maximum of 15 per cent, while the normal tax on individuals has remained much more nearly static. In the meantime, however, the surtaxes on individuals were gradually increased, and in recent years have advanced to a maximum several times as large as the corporation tax.

In 1936, two fundamental changes were made in the method of taxing corporations and their shareholders: A graduated tax on undistributed corporate earnings was imposed,[69] and the prior exemption of corporate dividends from the normal tax to individual recipients[70] was eliminated. There has been a great deal of discussion of the first change and very little discussion of the second. In the time available here tonight I shall not attempt to add much to the literature on

66. H. Doc. No. 260, 75th Cong. 1st Session, in Hearings before Joint Committee on Tax Evasion and Avoidance, 75th Congress, 1st Session, p. 2.

67. Report of a subcommittee of the Committee on Ways and Means, House of Representatives, 75 Congress, 3rd Session, on A Proposed Revision of the Revenue Laws pp. 12, 70.

68. 1913 Act, Section II, par. A, subdivision 1 and par. G(a) (38 Stat. 166 and 172).

69. Revenue Act of 1936, sec. 14 (49 Stat. 1655).

70. Revenue Act of 1934, sec. 25(a) (1) (48 Stat. 680, 692).

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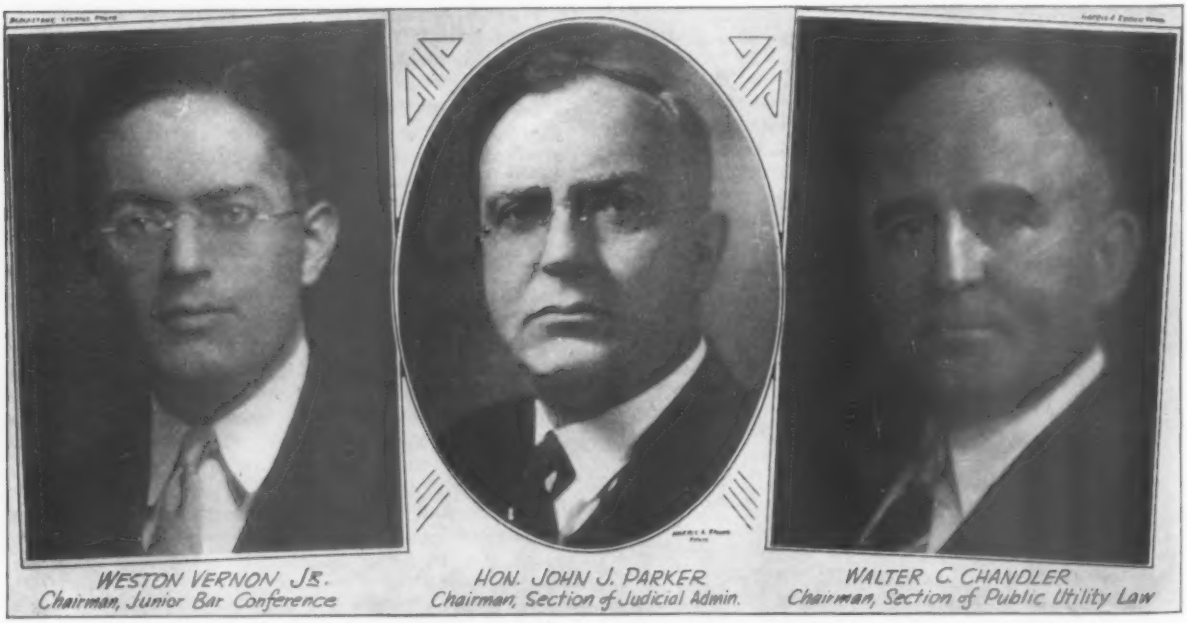

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REFORM IN JUDICIAL PROCEDURE

Time Is Ripe for New York to Make a Fresh Start in the Matter of Pleading, Practice and Procedure in Its Courts by Entrusting the Task of Making the Rules to the Courts—Question of Power—Reasons for Court-Made Rules—Methods of Getting the Necessary Spade Work Done and Need of a Standing Committee to Give Continuous Consideration to the Subject—Scope of Procedural Rules—No Reason in New York for Laying Rules before Legislature in Advance of Their Effective Date—Objections by the Bar—Uniformity*

By Hon. William D. Mitchell

Member of the New York Bar; Chairman of Advisory Committee of the Supreme Court of the United States

NOW that I am here, this opportunity to meet old friends and widen my acquaintance among the judges of the state which has recently adopted me is greatly appreciated, but may I compliment your chairman on the cunning he has exhibited in committing me to this engagement? His invitation came nearly a year ago. With the evil day so long postponed, the difficulties did not seem formidable. The invitation was accepted and then forgotten. Recently came a gentle reminder from Judge Lewis, reaching me in the heat of professional engagements, and with the hour too late for me to withdraw. I commend his tactics to those having the duty to arrange speakers' programs.

This situation has compelled me to select a subject with which I am familiar through two years of recent service on the Advisory Committee appointed by the Supreme Court of the United States to aid in drafting federal rules of civil procedure.

My proposition is that the time is ripe for New York to make a fresh start in the matter of pleading, practice and procedure in its courts, by entrusting to the courts the task of making the rules.

The experience of this state has been a sad one. Its practice code, originally adopted in 1848, was reenacted with changes in 1849. After further tinkering, a commission to revise it was appointed in 1870, which produced the Throop Code in 1876. By inclusion of various substantive provisions, the code grew to 3400 sections against 391 in the original Field Code. After two sporadic attempts in 1895 and 1900 to obtain revision, in 1904, a board, headed by Judge Rodenback, was created, and in 1912 was authorized to draft a revision of the code of procedure. Their report, an able one, published in 1915, contained a short practice act of 71 sections and 401 rules of court. The joint committee of the legislature rejected this report and substituted the Civil Practice Act, which went into effect in 1921. The legislature also authorized a convention to supplement the code with rules binding on the courts. Now we have 1578 sections of the Civil Practice Act, supplemented by 301 rules of practice. This code has many admirable features, but it is altogether too long, with too much detail, too many traps for the unwary, and with too much emphasis on forms and modes of procedure, and is lacking in recognition of the fact that in the administration of justice enforcement of rules of practice is not the end in view, and substantive provisions are intermingled with those relating to procedure. Experience with codes of procedure in other states justifies the statement that New York is the worst offender of them all in the particulars stated.

Beyond all this, in common with all statutory codes, there is the fundamental error that the New York system continues the old policy of legislative control of the details of practice.

It is universally conceded by experts on the subject that the first and fundamental step in procedural reform is to empower the courts to make and alter rules of practice.

For twenty years the American Bar Association has fought for that principle in the field of federal practice, and their efforts were recently crowned with success through the passage by Congress of an act giving to the Supreme Court of the United States power to regulate procedure in the district courts by rules which supersede existing statutes.

England has used this system with notable success for over half a century.

(1) *POWER:*

First for consideration is the question of power of legislatures under our constitutions to entrust this authority to the courts. There are some who contend that the power to makes rules of pleading, practice and procedure is part of the judicial power, inherent in the courts, which needs no confirmation from the legislatures, and which the latter have usurped. One hundred and fifty years of constitutional practice to the contrary makes it both futile and undesirable to raise such an issue. It is enough that the authority to make rules of practice is one which can be entrusted to the courts without infringement of the limitations on delegation of legislative power, provided the authority is limited to procedural matters, not affecting the substantive rights of litigants.

(2) *REASONS FOR COURT-MADE RULES:*

The reasons for entrusting this matter to the courts are numerous.

First, with the courts administering justice on the one hand and the legislature prescribing procedure on the other hand, there is a divided responsibility for defects in accomplishment. Legislatures and others blame the courts for delays and technicalities, and the courts in defense point to the restrictions placed upon them by the legislatures. There is an obvious advantage in placing with the courts, which administer jus-

*Address delivered before the New York State Bar Association, January 22, 1938.

tice, full responsibility for the methods by which justice is obtained.

Second, statutory codes of procedure lack flexibility and simplicity. They are rigid and highly formalistic. In Tyler's prize essay on the rule-making power, he said:

"Why has legislative regulation proved such a disappointment? The reasons are several, but it is principally because no system of procedure can be created *a priori*. It must be adapted to the realities of practice, it must be flexible and adaptable, capable of easy and speedy amendment, and replete with opportunities for the exercise of sound discretion."

Third, legislatures are not so constituted as to deal effectively with the problem.

The average legislature, faced with many other problems, has neither the time nor the interest to give the subject the requisite care and attention. Amendments by legislatures are both difficult and capricious. Rule makers should be in constant daily contact with the problem to keep them alive to changing needs. Judge Cardozo once said:

"The legislature, informed only casually and intermittently of the needs and problems of the courts, without expert or responsible or disinterested or systematic advice as to the workings of one rule or another, patches the fabric here and there, and mars often when it would mend."

Rules of procedure are merely the tools with which judges work, and why should expert workmen not fashion their tools to meet their needs?

(3) *METHODS:*

If courts are entrusted with this power, some body of men must be entrusted with the spade work. The final authority to make or alter rules should be entrusted to the highest court in the jurisdiction, and in New York should be the Court of Appeals. This is necessary to bring uniformity and it is advisable since the judges of the highest court have the longest judicial experience and the broad vision demanded. Though vested with the final authority, the courts need assistance. Whether in this State the initial task of drafting proposed rules should be vested in the judicial council or in some committee especially chosen to work under its supervision, is a point of detail to be settled by those having long experience with local conditions.

My impression is that the judicial council has many other problems of substantive law to consider, and although procedural matters are within its field, it would do well to entrust the preliminary draftsmanship to a specially constituted committee. However such committee is constituted, it must be remembered that the average lawyer has a limited experience with systems of procedure. His judgments are influenced by those limitations. He pulls back in the traces against proposals outside the limits of his experience. That was impressed on us who served on the Advisory Committee appointed by the Supreme Court of the United States, with a membership of fifteen drawn from different sections of the country, most of us with very limited knowledge of procedural systems. We labored under those limitations for a time, but gradually were able to rise above them. Let me give one illustration. During the course of our proceedings, someone asked what we were to do with the writ of *scire facias*. Now, I had seen those words in some law book, but had never seen a writ of *scire facias* and was ignorant of its uses, and suggested that it be relegated to the scrap heap. Members from other states were aghast and protested that it was a useful weapon and, like the Union, must be preserved.

The subject was passed over for the time, and meanwhile I crept into a library to learn what *scire facias* meant, and found that it was used sometimes to revive judgments about to expire under statutes of limitations, or to enforce liability on bonds and recognizances, and in Pennsylvania, even as an independent action to foreclose mortgages. Later, when the protesting members of the committee seemed to be in a comfortable mood, I asked if there was any relief obtained by *scire facias* that could not as well be obtained on motion or by independent suit, and the answer was in the negative. Now, we had adopted a rule that writs of mandamus are abolished, and that the relief heretofore available by mandamus may be obtained by appropriate action or appropriate motion, so the suggestion was made that we include *scire facias* in the rule, and it now reads that writs of *scire facias* and mandamus are abolished, and that the relief heretofore available by either be obtained by appropriate action or motion under the practice prescribed in the rules. Thus, we buried *scire facias* along with petitions for writs of mandamus, returns to alternative writs and peremptory writs of mandamus.

In constituting its advisory committee, the Supreme Court of the United States wisely selected five law school professors who had specialized in procedural matters and possessed broad knowledge of procedural systems in all English speaking countries. They supplied the proposals to which the active practitioners on the committee applied the test of practical experience.

If New York should undertake this reform, it would be fortunate if it could command the services of law school men of this wide vision and expert knowledge.

To insure the success of court-made rules, it is desirable to have a standing committee of this type continuously to give consideration to the subject and act as a buffer to the court, by receiving and analyzing suggestions for change. Quoting again from Judge Cardozo:

"The duty must be cast on some man or group of men to watch the law in action, observe the manner of its functioning, and report the changes needed when function is deranged."

With law school men on such a committee, there is no danger that needed reforms will be delayed. My experience is that most professors of law are quite generally dissatisfied with all our institutions, and quick to suggest change.

In the formulation of practice rules, stress should be laid on the need for general consultation with the bench and bar. Preliminary drafts should be made and generally distributed to the profession to invite suggestions and criticisms. In the performance of its task, the Supreme Court of the United States caused two such drafts to be printed and distributed to the bar of the country. Hundreds of valuable suggestions were received and carefully considered by the Advisory Committee. The final report of the Advisory Committee was the result of this composite effort of the bench and bar. This method of consultation with the profession also forestalls opposition and softens criticism.

(4) *SCOPE OF PROCEDURAL RULES:*

Rules adopted by the courts must be limited to matters procedural in their nature and not deal with questions of substantive right. The two subjects are separate and distinct and should not be confused, although the line of demarcation is not always clear. The Act of Congress under which the federal rules have been drawn properly prescribes that "said rules shall

neither abridge, enlarge, nor modify the substantive rights of any litigant." Aside from other considerations, the elimination of substantive matter leads to brevity and simplicity. The present New York Civil Practice Act contains some chapters, such as the statute of limitations, which obviously do not belong in rules of procedure, but in addition to that, many of the procedural sections are interspersed with provisions affecting substantive rights. One of the tasks in New York would be to lift out of the Civil Practice Act all the procedural provisions and embody the practice system in the court-made rules. It would then be necessary to draft a statute preserving the substantive provisions of the Civil Practice Act as a separate enactment, and recommend that for passage by the legislature as a simple codification of the present provisions of the Civil Practice Act having to do with matters of substantive right.

(5) *SUBMISSION OF PROPOSED RULES TO THE LEGISLATURE:*

The Act of Congress to which I have referred authorized the Supreme Court, without any submission of its proposals to Congress, to adopt rules of practice for the district courts in actions at law, and the Act provides that on the promulgation of the rules "all laws in conflict therewith shall be of no further force or effect." In another section the Congress authorized the Court to unify the practice for actions at law and suits in equity, but required that if that course were followed, the rules be laid before Congress at the opening of a session and not go into effect until after the close of the session, thus giving the Congress the opportunity to enact legislation modifying the proposed rules. Doubtless the Congress believed that the unification of procedure for actions at law and suits in equity was a drastic reform in the federal courts, and thought it wise to take a look at the proposals before they became effective. In New York that union has long since taken place, and there seems no reason for any provision that rules of procedure promulgated by the courts should be laid before the legislature in advance of their effective date. Such a requirement is undesirable because it offers a temptation to some members of the legislature to bring about legislative changes in the proposals without knowledge of the reasons which influenced the drafting committee or the court in formulating the rules, and would thus destroy the fundamental proposal to entrust to the courts the task of dealing with procedure.

(6) *OBJECTIONS BY THE BAR:*

To any change in the practice with which they are accustomed, lawyers will object, on the ground that they are familiar with the present system and should not be required to learn a new one. Experience with the bar in the preparation of the federal rules has shown that the great majority of our profession are able to rise above this consideration in the interests of reform. The present generation will not last forever, and those who follow us will be grateful for a simple and abbreviated procedural system to shorten their labors. Even the present generation will have no real difficulty in mastering a new system. With the great length and complications of such a system as New York now owns, a comparison of the proposed federal rules of civil procedure is pertinent. It is true the proposed federal rules have left some fields untouched. There is only a paragraph or two on the subject of evidence, and such matters as sales on execution, proceedings supplementary to judgments, attachments and such like, have been left to be governed by the existing practice in the states where the federal courts sit. With those omissions and with the elimination of matters of substantive right, the federal rules cover fairly well the whole field of practice, pleading and procedure in only 88 rules, which any practicing lawyer can master with little effort. The same field is covered by over 1100 of the 1578 sections of the Civil Practice Act of this State.

(7) *UNIFORMITY:*

One of the great objectives of court-made rules, as distinguished from legislative codes, is uniformity in pleading and practice throughout the Union and between the state and federal courts. It is expected that if the principle is generally adopted of entrusting procedural matters to the courts, court-made rules throughout the nation will tend toward uniformity. A number of the states have already adopted the system of entrusting this subject to the courts, and their commissions have been awaiting the promulgation of the federal rules with a view to following them. Some differences between state rules and federal rules will always be found because of the limited jurisdiction of the federal courts and varying local conditions, but notwithstanding this, the best chance for reasonable uniformity between state and federal courts rests on the adoption by the states of the policy of placing with the courts the responsibility for procedural matters.

Some states are already on the way to this reform. New York needs it. With the many undeserved assaults now being made on the courts, it behooves the profession to remove any real ground of complaint against our judicial system. The coming Constitutional Convention may touch upon the subject.

In conclusion, let me repeat my opening statement. The time is ripe for the lawyers of New York to attack this problem.

Law Library Celebrates One Hundredth Birthday

The St. Louis Law Library Association celebrates its one hundredth anniversary this year, according to an article in the Bench and Bar for February. From a modest beginning it has grown until today it has some 58,000 volumes and is one of the most up-to-date and best known law libraries in the country. It was in May, 1838, that twenty-two members of the Bar signed a proposal to establish the Law Library Association. Twenty of them contributed $20 apiece and with the books bought with this small sum the institution began its useful career. At first the books were kept in an upper room of the Court House at Broadway and Market Streets. In 1842 the Library boasted of 640 volumes, in 1851 it had 1,957, and in 1885 it had increased the total to 13,000. It was moved in 1909 to the Pierce Building where it remained until completion of the Civil Courts Building. The present Librarian, Mr. Gamble Jordan, has been with the Library for more than half a century.

Binder for Journal

The JOURNAL is prepared to furnish a neat and serviceable binder for current numbers to members for $1.50. The price is merely manufacturer's cost plus expense of packing, mailing, insurance, etc. The binder has back of art buckram, with the name "American Bar Association Journal" stamped on it in gilt letters. Please send check with order to JOURNAL office, 1140 N. Dearborn St., Chicago, Ill.

PRACTISING LAW COURSES

New Legislation, Development of New Fields of Practice, and the Increasing Specialization of Practice Have Created a Need among Older Lawyers for Instruction in Particular Fields—Need for a Carefully Planned, Well Integrated Course of Practical Instruction for Recent Law School Graduates Has Been Apparent for Some Years—Details of Successful Effort to Meet This Demand in New York City—Courses Conducted under Supervision of an Advisory Committee—Courses in Philadelphia, San Francisco and Toledo—How They May Be Organized in Other Cities—Proper Selection of Subject Matter for Lectures—Some Practical Suggestions

By Harold P. Seligson*
Member of New York Bar

LAW SCHOOL graduates today are generally better trained in legal theory than were the young lawyers of an earlier generation, who as a rule had less formal education and acquired their professional training by reading law in a lawyer's office. The earlier method, however, afforded the student the opportunity to be present when the practitioner, who was his preceptor, interviewed witnesses, conferred with clients, prepared and tried cases and performed the daily work of a practicing attorney. Thus he acquired a working knowledge of how to practise his profession. Modern law schools customarily limit themselves, and perhaps wisely so, to teaching substantive and adjective law, methods of legal analysis and the interpretation of judicial decisions. Their graduates are left to acquire their training in practical technique after leaving law school.

The increasing specialization of legal practice as well as the speed and pressure of modern life usually result in the young lawyer's experience while a law clerk being limited to a few fields of practice; moreover, such training is usually casual and haphazard. The young lawyer customarily obtains his practical knowledge in the school of hard knocks, frequently learning by sad experience and at the expense of his first clients. The need for a carefully planned, well integrated course of practical instruction for recent law school graduates has been apparent for some years.

New legislation, the development of new fields of practice and the increasing specialization of practice have created a need among older lawyers for instruction in particular fields. Law school courses intended for students are seldom suitable for practicing attorneys. The practitioner wants instruction along practical lines—instruction so organized that it can be readily assimilated and utilized in practice.

The Courses in New York City

To meet these needs, the Practising Law Courses were organized by the writer in New York City five years ago. We began with a class of fifteen recent law school graduates, to whom 16 lectures were given by four practicing attorneys. The lectures were designed to introduce the young lawyer to the work of the practitioner in the more important phases of general practice. The lectures were primarily practical. Substantive law was dealt with only where necessary for an understanding of the methods of dealing with the practical problems discussed.

The course was successful from the beginning. Twice each year the course has been repeated and gradually expanded. Today the course on general practice for young lawyers consists of thirty lectures of two hours each, given on Monday and Thursday evenings. Over one hundred attend each term.

To meet the needs of more experienced attorneys and to afford additional and more intensive training for the young lawyers who have taken the introductory course, several years ago we began to offer specialized courses each of which dealt with a single field of practice. At first each specialized course consisted of four lectures. Slowly we expanded each course and from time to time added courses in other subjects. We now have twelve different specialized courses varying in length from ten to sixteen sessions. These courses are of varying popularity. Their respective enrollments at the last session were: Real Estate, 57, Income Tax, 52, Trials, 50, Corporate Practice, 34, Wills & Estates, 31, Bankruptcy, 28, Negligence, 21, Accountancy for General Practitioners, 18. The courses in Labor Law, Corporate Accounting, Trials Clinic and Criminal Law, are given for the first time this term and enrollments have not yet been completed. The attendance of the first lectures of each of these new courses was respectively, 59, 40, 52 and 22.

A unique course is the Trials Clinic. It is designed to furnish actual experience and skill in the trial of typical cases. The method employed is similar to that which has proven successful in Chicago where for a number of years classes in Trial Technique have been given.[1] No lectures are given in the Trials Clinic. (We have a separate course of 12 lectures on the preparation and trial of law suits). A typical session is that on Opening to the Jury. The members of the class are given mimeographed sheets containing summaries of the facts in typical law suits. One lawyer is called on to open for the plaintiff in the first case. Another opens

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1. This method was originated by Irving Goldstein, author of the hand book "Trial Technique." Mr. Goldstein conducts a number of classes privately and also gives a similar course for third year students at Northwestern University Law School. John Marshall Law School offers a similar course in its Post Graduate department.

for the defendant. All members of the class are free to interpose objections. The instructor, an experienced trial counsel, acts as Judge and makes brief criticisms, comments and corrections. During the term each lawyer goes through each steps of several trials. Other sessions are devoted to selecting a jury, direct examination, introducing documentary evidence, proving damages, cross examination, summation, etc. Members of the class act as jurors and witnesses. To assure frequent participation, each section of the Trials clinic is limited to 25.

To summarize, the courses in New York City consist of an introductory or general course of 60 hours and 12 specialized courses varying in length from 20 to 32 hours. About 50 lawyers deliver lectures each year. Over 700 attended one or more of the courses during the past year (two semesters).

With a view towards making these courses available to lawyers in other parts of the country we are contemplating a summer session in which the courses will be given daily. Thus lawyers may attend the courses while spending a two weeks vacation in New York City. Air-conditioned lecture rooms and special summer season hotel rates would appear to make this feasible.

In 1933, after the first session had been successfully completed, we endeavored to persuade our local bar associations to take over and conduct this work. The matter was referred to their committees on legal education, which after investigation rendered various commendatory reports.[2] For several years we have worked towards bringing about the organization of a post-graduate law school to be chartered by the State Board of Regents. Problems of finance, endowment, etc., are being considered. Pending the formal organization of a chartered institution, the courses are conducted under the supervision of an Advisory Council consisting of Arthur A. Ballantine, Charles C. Burlingham, Judge Robert P. Patterson, Lloyd N. Scott, Hon. Clarence J. Shearn, Judge Bernard L. Shientag, Dean Young B. Smith, George A. Spiegelberg, Sol M. Stroock, Hon. Thomas D. Thacher, Archibald R. Watson and Col. Cornelius W. Wickersham. The members of the Advisory Council were selected largely from the membership of the committees on legal education of the Association of the Bar of the City of New York and the New York County Lawyers' Association, and include law school people, judges and leaders of the Bar.

The courses, since their inception, have been self-sustaining. Tuition charges are somewhat less than the fees of law schools for comparable instruction. In the beginning the lecturers served without remuneration. Most of them now receive modest compensation.

The Courses in Philadelphia, San Francisco and Toledo

Following the publication of a prior article[3] by the writer requests for specimens of the materials used in our courses were received from lawyers in various parts of the country. Practising Law Courses were thereafter organized in San Francisco, Toledo and Philadelphia. Bar groups in other cities are also contemplating organizing similar courses.

The San Francisco course, established in the Spring of 1937 under the auspices of an alumni association of Stamford University Law School, consists of 15 two hour lectures given one evening a week. A pamphlet describing the course was mailed to about 3,000 members of the local bar. About 450 applications for enrollment were received. Due to limited physical facilities only 288 could be enrolled. Of this group, 155 were attorneys admitted to practice during the past six years, about 20 per cent of the total enrollment being lawyers in their first year of practice. A fee of $5 was charged for the course. Those desiring to attend only single lectures were charged $1 for each lecture.

The Toledo course, conducted by the Law College of the University of Toledo, began in the Fall of 1937. It likewise consists of 15 lectures of two hours each, for which a charge of $12.50 is made. About 150 applications for enrollment were received. Physical facilities caused the class to be limited to 75.

The Philadelphia course, given under the auspices of the Law Alumni of Temple University, was first offered in January of 1937. It consisted of 15 lectures of 2½ hours each with an average attendance of 150 lawyers. Attendance at the first session was restricted to members of the Law Alumni of Temple University and students in the senior classes of the law school. No charge was made. The second series of the Philadelphia course, which is now in progress, consists of 14 lectures, and is open to all members of the Bar at a fee of $7.50. (Members of the Temple Law Alumni are charged only $5.) Over 100 lawyers attend.

The subjects covered in the 15 lecture courses include Trial of Negligence Cases (one lecture on the plaintiff's case and a second lecture on the defendant's), Municipal Court Practice, Motions and Ex Parte Practice, Preparation for Trial, Trial by Non-jury Cases, Drawing of Wills & Trusts, Administration of Decedents' Estates, Preparation of Contracts, Real Estate Conveyancing (2 lectures), Workmen's Compensation, Criminal Practice, Domestic Relations, Appeals.

Although each of the courses include most of these subjects, lectures are also given in certain of these courses on Income Tax, Federal Procedure, Building Contracts and Mechanic's Liens, Federal Trial Practice, Federal Appellate Practice, Social Security Act, Securities Regulations, Mortgages and Deficiency Judgments, etc.

The writer believes that the subjects first listed are of greater value to young lawyers and should constitute the major part of any course, at least the first time that it is offered.

So much interest has been shown by the Bar in this work[4] that the meeting of the Section on Legal Education of the American Bar Association held in Kansas City was devoted to Post-Admission Education for Lawyers. The Convention adopted a resolution "that the American Bar Association sponsor and encourage a nation-wide program of post-admission legal education for the benefit of the legal profession." A subcommittee of the Council on Legal Education has been organized for that purpose.

The Illinois State Bar Association is endeavoring to stimulate such instruction by providing local groups with lecturers on practical topics. The California State

2. Association of the Bar of the City of New York, Reports of Committee on Legal Education, "Year Book," 1934, p. 193; 1935, p. 226; 1936, p. 242; Report of Special Committee on Post Admission Education, Nov. 16, 1936, p. 3.

New York County Lawyers' Association, Report of Committee on Legal Education and Admission to the Bar, "Year Book," 1936, p. 169.

3. "Post Admission Education for Lawyers," American Bar Association Journal, April, 1936, p. 231.

4. Report and Proceedings of Section on Legal Education Admissions to the Bar of the American Bar Association, Sept. 29, 1937, printed in "American Law School Review," Dec. 1937; "American Judicature Society Journal," Oct. 1935, p. 90; Feb. 1936, p. 142; April 1936, p. 172; Feb. 1937, p. 215; "California State Bar Journal," March 1937, p. 58; May 1937, p. 109; Dec. 1937; "Illinois Bar Journal," Jan. 1938; "Tulane Law Review," Dec. 1937, p. 108; "American Bar Association Journal," Oct. 1937, p. 777; Jan. 1938, p. 11; Feb. 1938, p. 116.

Bar Association is at present considering plans for organizing such courses for young lawyers.

How Courses May Be Organized in Other Cities

It is believed that Practising Law Courses can readily be established in cities having a population of 100,000 or more. The following suggestions are offered to that end:

To begin with, the course should consist of between 6 and 15 lectures of two hours each, given one evening a week. The number of lectures should depend somewhat on the size and interest of the local Bar. The subjects first treated should be those of greatest interest to young lawyers. The lecturers should consist principally of lawyers of approximately ten years experience. Men should be selected for their ability to present their material clearly and vividly. No lecturer should be accepted unless he is willing to spend at least ten hours in the preparation of his lecture. A sprinkling of lectures by judges and eminent older attorneys of wide reputation has its obvious advantages. Experience indicates, however, that the younger attorneys are closer to the problems which perplex the legal novitiate and will usually prepare more thoroughly and deliver more interesting lectures than the bigwigs.

The value of such courses depends primarily upon the proper selection of the subject matter to be included in each lecture. The guiding principle must be to limit the discussion to those problems which arise most frequently—not those problems of most interest to the expert. The lecture should be confined to typical run-of-the-mill cases, such as a young lawyer will be engaged upon in his first years of practice. Each lecture should include as many practical suggestions as possible. Illustrations from actual practice should be frequently employed but such examples should be dealt with briefly. Care must be exercised that the lecture does not degenerate into a mere after dinner talk about the lecturer's interesting experiences. Elaborate introductions and humorous anecdotes have no place in such lectures.

The lecture may well begin with a statement of a typical problem. Thus, our lecture on Organizing Corporations begins: "Your client telephones and says 'I want you to organize a corporation for me. I will invest $10,000, Mr. Brown, a salesman, will invest $2,000 and Mr. Jones, a merchandise man, will invest $3,000. We are to share the profits equally.' How should the attorney set up the capital structure so as to accomplish the business man's purpose and at the same time afford maximum protection to his client, the major investor?" Answering these questions involves a discussion of the use of common and preferred stock, par and no par stock, cumulative voting and other devices for the protection of minority stockholders, stockholders' agreements restricting the transfer or pledge of stock, etc.

The citation of cases should be avoided. Mimeographed sheets containing summaries of the relevant decisions, reference to the statutes and rules of practice and the appropriate pages of form books should be distributed in advance of the lecture.

Each lecture should be carefully outlined in advance and the outline submitted to the supervisor of the course or the supervising committee for criticisms and suggestions. The lecturer should not read his lecture. He should have his material so well in hand that there may be a minimum of reference to his lecture notes. A one page outline listing the topics in the order in which they are to be covered should be a sufficient guide while lecturing. The lecturer should determine in advance not only the points he expects to make but also the illustrative cases he plans to use. As little as possible should be left to the spur of the moment.

An informal style of delivery should be encouraged, a classroom atmosphere avoided. The lawyers attending may be permitted to smoke. Colloquialisms of speech and colorful language are valuable. They preclude a "stuffed shirt" atmosphere.

Lecturers who speak with undue slowness and in a monotonous tone are deadly. No matter how great an expert in his particular field a lecturer may be, his audience will benefit little if he cannot hold their interest and stimulate them.

A two hour lecture period, of which the last fifteen minutes is devoted to questions and answers, has been found most satisfactory. A five minute recess should be taken at the end of the first hour. Since the lecturer's name, title or office association has been announced in the leaflet mailed out before the course began, there is no need for an introduction. Where the eminence of a speaker may make an introduction advisable, it should be most brief. The audience is there to listen to the lecture, not to the introduction. At the conclusion of the lecture members of the class should, where possible, be encouraged to gather around the lecturer in an informal group for further discussion, particularly of practical problems in pending office matters, if the problems are such as can be briefly stated and briefly answered.

Those attending should be encouraged to take notes. This aids in encouraging a serious attitude on the part of the class. A good lecture is usually reflected by lengthy notes.

The course should not be given unless a class of at least 25 can be enrolled. Larger enrollments are, of course, desirable. Newspaper publicity, personal solicitation through committees, direct mail solicitation in the form of a leaflet containing the dates of the lectures, the names of the lecturers and a short description of the subject matter of each lecture should all be employed. The first lecture should be open to all members of the Bar without charge. The course may well be introduced by a popular judge, whose talk should be short and limited to endorsing the program and stressing the benefits to be derived by those who attend. This should be followed by the first lecture of the series. The names and addresses of those attending the opening session should be noted and provision made for taking enrollments during the recess. The importance of having the first lecture valuable and interesting is obvious.

Work of this character may well serve to rejuvenate inactive bar associations. Reduced tuition fees to members in good standing will stimulate membership. The advantages to be derived by a local bar association or law school alumni group through the carrying on of such a program are many.

Experience has demonstrated that such courses can be readily set up. The lecturers may be selected and all necessary arrangements made by a small committee consisting principally of older members of the local junior bar with the assistance of one or two youthful elders.

Those already engaged in this work will be happy to supply samples of the materials used and to give newcomers in the field the benefit of their experience.

It is submitted that such courses over a period of years will aid in increasing the professional capacity and skill of practicing attorneys and thereby aid in the improvement of the administration of justice.

THE HOUSE OF LAW IN A TIME OF CHANGE

Curious Estate Which Professional Law Teachers Have Inherited and What Can Be Done to Develop It—The Student Body as the Most Important Part of It—Economic Problems of the Young Lawyer and Three Ways in Which Progress Might Be Made Toward Easing Them—Opening up New Avenues for Employment—Intelligent Placement—Full-Time "Bar Surveyors" to Gather Facts as to Economic Condition of the Bar—Guidance of Students in Pre-Law Courses—Plan for Closer Contact with Profession—More Coherent Curriculum Needed—Aims and Ideals of the Last Two Generations of Lawyers, and the Fundamental Question of Their Enlargement to Meet Demands of Public Interest Today—Personal and Educational Problems Involved, etc.*

By Lloyd K. Garrison
President Association of American Law Schools, 1937;
Dean of Law School, University of Wisconsin

WE law teachers are like certain grandsons who inherited a family business. Their ancestor came up from nowhere, perceived a public need, thought up a new way of meeting it, started the business, and kept it afloat despite the competition of the older houses and the skepticism and even ridicule which greeted his pioneering efforts. His many sons took over the venture and made a whopping success of it. They expanded it in every direction. They improved here and there on the old man's design, and with invincible energy and enthusiasm succeeded in capturing the lion's share of the market. And what was equally important, they also succeeded in rearing a multitude of children who looked very promising and who were given a fine education and an early training in the secrets of the trade.

By the time the second generation started dying off, the family prestige was at its height; the business was prospering beyond its founder's dreams; and even the few remaining competitors acknowledged that the eccentric old chap had, after all, been a great man.

But all the while changes had been taking place in the business world which the founder could hardly foresee, and which his sons, in their eagerness to dominate the field, paid little heed to. When the grandsons took over, these changes had gone so far that the business clearly had to be restudied if it was to keep from slipping. Many of its customers were complaining that its products weren't as good as they used to be; and competitors who had been copying its methods began suddenly to multiply and to make noisy claims about their own products.

So the grandsons set to work, but with much difficulty, because they couldn't agree altogether on the policies to pursue. When they disagreed they were very polite to one another, as brothers should be, and always listened to each other's counsel very patiently, and kept up a great correspondence and had an annual family get-together at which they all talked for three days without stopping. They visited each other quite a bit too, and this was helpful because many of them tended to live on in the houses they were born in and to go to the same office and work in the same little department year after year, without ever stirring about and seeing what the others were doing.

But still, with all this fine friendly interchange, they disagreed. Some didn't think the things that had been happening in the outer world were very important. Others thought they were frightfully significant, and said so with such emphasis and so often that their brothers began to regard them as alarmists and simply brushed aside their proposals. Still others, with tender ancestral feeling, insisted on invoking their grandfather's memory at every occasion and resisted any plans which didn't seem to jibe with the family tradition.

There were a few who didn't take much part in these conclaves, but just attended to business very quietly, worked like trojans, and ended up by making notable contributions to the success of the enterprise. There were a few also who felt very keenly that the enterprise needed a general overhauling, but they didn't know what to do about it, and so they contented themselves with poking fun at the stodgier members of the family, and acting generally as gad-flies. Though they often said rather shocking things they were tolerated by the others, who regarded them good-naturedly and even joked about them in private.

Finally there were a few who would leave the business for a while and then come back to it with novel ideas of how it looked from without and of what was going on in the world. Moreover the business was growing so fast that every now and then strangers had to be brought in at a mature age and given important work to do, and these strangers, while they quickly accommodated themselves to the family ceremonials and respected its traditions, also brought with them novel ideas which they never wholly lost.

So it was difficult for this oddly assorted group to get together on policies. But very soon the out-

*Presidential address delivered at Annual Meeting of Association of American Law Schools in Chicago, Dec. 29, 1937. The concluding portion of the address, dealing with certain matters not of general interest to the profession, has been omitted, with Mr. Garrison's permission.

side changes began to press so hard against the business that, without any common agreement from on top, various departments began to adjust themselves piece-meal to the new demands on them: here in one way and there in another, here very slowly and cautiously and there with some boldness and dash. And in the main these adjustments worked out fairly well, and the business managed to hang together. The family as a whole looked on with some amazement and not without misgivings at what was taking place, and longed for someone to map out a clear and consistent plan by which they all might be guided. But there was no one that could do this for them—at least no one who seemed sufficiently wise for them to follow.

Well, that's something like our family, isn't it? Except that the estate we've inherited fortunately isn't a commercial one. We don't have to try to make money out of it, which is lucky for us. But for that very reason we have to think about a lot of other things, which are even harder to figure out than business policies.

Our estate is indeed a curious one. It consists of nothing but buildings with books in them, and ourselves, and some students. A few of the buildings are really elegant, some are good enough, and some (like the one my colleagues and I inhabit) are about ready to give up the ghost—or, more likely, to acquire ghosts. But we don't care much and can't do much, about that.

As for ourselves, we can't do much about that either. Here we are, and here, with the grace of God and academic tenure, we shall remain. Some of us are underpaid, and that ought to be remedied; but we are not grumblers, and rightly not. Some of us are overworked, and that ought to be changed, not because we mind work but because heavy teaching loads kill good teaching. Some of us are stale and in a rut, and that most certainly needs attention. The Committee on Faculty and Students, whose report is before us, thinks we should encourage exchanges, which surely we should, for our mutual stimulation. But the Committee concludes that as an Association we can be of very little help in that direction, which may be true.

We might, however, as an Association do something about promoting sabbatical leaves with pay, say every six or eight years. In many universities there is no such provision. It would be a fine thing if each of us could get a year off every so often and get away and study somewhere, or travel, or go into a law office or into some governmental department, state or federal. Might not our Association appropriately study this matter, find out what the different universities are doing or not doing and then recommend a standard policy? For obvious reasons any policy would have to apply, within a given university, to all professors, whether law teachers or not; and for this reason we might well join with other organizations like the American Association of University Professors, if they were interested, in developing a common program and in urging it on the universities. If budgetary difficulties prove to be as formidable as I imagine they are, we might at least recommend that leaves be granted to teachers who can get jobs elsewhere with pay; that the pay be deducted from their salaries less the expenses incident to moving; and that each teacher be periodically encouraged and assisted by his university to make the necessary arrangements. I don't know whether this or any other plan would work, but I do think it is something we should look into as an Association.

Another stimulus for us, and a helpful service to boot, would be the institution of evening courses for lawyers, which the American Bar Association advocated last summer. A few of us have been pioneering in that work with good results. The demand is there, and we ought to respond to it.

So much for ourselves. I could say more, but we are modest, and don't like to talk too much about ourselves. The third part of our inherited estate is the student-body, and it's the most important part because the estate exists for them and not for us. What are these students up against today? For one thing, great economic pressure. The report of the Committee on Faculty and Students shows that in the member schools an average of about 40% of the students are wholly or partly self-supporting. In few if any of the schools are there adequate scholarship and loan funds. Many of these working students devote as much as five or six hours a day to their jobs. Under these circumstances, they simply can't get the full benefits of the law course. They haven't enough time for study; they are worried, fatigued and often run down physically.

The skimping of the law course by large numbers of needy, hard-pressed and mentally exhausted students leads only to the production of a crop of thinly equipped lawyers. Nothing would more quickly promote the standards of legal education than the establishment of adequate scholarships to be awarded to the most promising students, whose brains are worth backing in the interests of society. With this conviction I approached the Hayden Foundation in New York last summer to ascertain whether the Foundation would consider as within its purposes an application from our Association for an annual grant of funds to be distributed by us to the member schools in proportion to the number of their high-ranking students who were in real need. I was told that such an application would be proper and would be given due consideration. If the report of the Committee on Faculty and Students is approved, an application will be made accordingly, and if it is made, I hope we will strongly support it.

But we have to take account of the economic pressure our students are up against not only in law schools but when they get out. We know that we are training some men who won't be able to get jobs as lawyers. We know that we are training some others who will be hanging on the fringes and would be better off if they'd never tackled law. All this is terribly disturbing to us. But we don't know from year to year how many of these unfortunates there are going to be. We are beginning to talk about quotas but I for one don't think we are wise enough, or ever will be wise enough, to apply such drastic medicine.

I do think, however, that there are at least three ways in which progress might be made toward easing the economic problems of the young lawyer.

First, there is the possibility of opening up new avenues of employment. One such avenue might be afforded by low-cost legal service bureaus, managed under bar association or judicial control or both, and specializing in service for people of small incomes. There is reason to suppose, as the Connecticut sur-

vey indicated and as the New York County Lawyers Committee believes, that bureaus of this sort would fill a great need and would, in addition, tap sources of legal business which nobody now handles and which ought to be handled in the public interest. I agree with our Committee on Cooperation with the Bench and Bar that this is a question we should join with the profession in exploring, for while the bar is directly and immediately concerned with it, we are also concerned with anything that may affect the future of our students.

Another new avenue of employment, and one which is also needed in the public interest, would be to equip the chief trial and appellate courts with young law clerks who could help in going over records, checking citations in briefs, looking up law and so on. Several states, of which Massachusetts was the first, have furnished their supreme courts with law clerks, and wherever this experiment has been tried it has resulted in enabling the courts to handle their work not only more expeditiously but more thoroughly. A year ago I corresponded informally with the chief justices in these states about the functions and the value of their law clerks; and the details they gave me, and the enthusiasm of their responses, persuaded me that this whole matter ought to be seriously studied and widely discussed. I know of at least one busy trial court, now over a year behind on its calendar, whose judges would welcome the assistance which law clerks might afford; and it seems to me there can be little doubt but that the work of the trial courts, like that of the appellate courts, could be expedited and improved by this device. Legislatures, of course, are loath, as they always have been, to spend money on the courts; we have done a poor job of demonstrating to the public that in the administration of justice, as in so many other matters, to be penny wise is to be pound foolish. I suggest, therefore, that our Association might appropriately study the whole question of better equipping the courts, not as a mere job-creating business, but for the sake of efficiency.

If our first step should be to explore new avenues of use for lawyers that will benefit the public as well as the bar—and there are doubtless other avenues I haven't mentioned—our second step should be to develop placement bureaus in each state, to steer men away from the clearly overcrowded communities, and toward the less crowded, and into small towns which could support a lawyer but which have none; to help firms who want a particular kind of man in getting that kind of man; and to assist generally in opening up the new avenues of employment we've been talking about. A partial attempt at this in Wisconsin indicates that placement work is a full-time job which calls for much travelling, for an intimate acquaintance with the state, and above all for continuous information about what is happening to the bar.

And this brings me to the third step we ought to take, which is to get at the facts about the economic life of the bar, to keep getting at them, and to disseminate them as widely as possible. Our bar surveys have shown that the facts can be had; that they are hard to get at; and that because of the excessive amount of work involved neither bar association committees nor law teachers (I speak from painful experience) can be counted on for more than spasmodic efforts—here a survey, there a survey, then a pause. And but partial surveys at best.

It seems to me that what is really needed is, in each state, to engage at least one man who will devote substantially full time, year in and year out, to assembling and keeping currently up to date, all available data about the economic life of the bar in that state. He should also take care of the placement work which I have spoken of, for the success of that work will depend upon having the fullest possible information about the bar. He ought to know at all times how many lawyers there are in active practice, what they are making, where they are located, their ages, types of practice, and so on. He ought to keep track of deaths, resignations, entries of non-residents, suspensions and disbarments. He should chart the failures as well as the successes of lawyers, and find out what background, training and equipment contributed to both results. He ought to know quantitatively and qualitatively the volume of litigation in the different courts and all the other possible sources of measuring legal business. He ought to follow every man admitted to practice, whether he has assisted in placing him or not, and find out what becomes of him. He ought to watch with an eagle eye the shifts in the nature of legal work, and be able to tell at any given time whether the bar is short or long on patent lawyers, admiralty lawyers, labor lawyers, tax lawyers, commission experts, and so on. He ought to keep track of all transfers from law into business or from law into government, and to know whether these transfers were for economic or for other reasons. And all of this information and much else that might be helpful should be charted and correlated, with an eye, above everything, to trends and curves. Isolated surveys, though abundantly worth making for other reasons, cannot show trends or predict the future from the past, or tell us what is truly important in our findings. What we need are continuous surveys by full-time experts. To make their findings more significant, and to avoid any misleading implications, these experts should gather as much comparable information as possible about the medical and other professions; in itself a huge task, but one which ought to be performed if the legal profession is to be viewed in just perspective.

Let us call these experts, for want of a better phrase, bar surveyors. What would we do with all the facts they gathered for us? Why, distribute them, and keep distributing them, to the bench, the bar, the law schools. And in the law schools we would relay them to our students and, most important, to pre-law students and to all applicants for admission. All of us know from experience, and the recent California survey of the lawyers in practice for five years has statistically shown, how many young men enter law study without the remotest notion of what they will be up against when they get out or with exaggerated conceptions of the success awaiting them. Surely if we could give these men the straight dope before they cast the die we would save many from entering the profession only to find in it heart-breaks, bitterness and failure.

Step one, new avenues of employment; step two, intelligent placement; step three, the straight dope, continuously gathered and disseminated; and all of this work assigned to full-time surveyors in the different states. Doesn't that make sense? But who would pay the surveyors? Well, why not the state? Why does a state provide for bar examiners?

To get a profession which is fitted for its public tasks. Then why not provide for full-time experts who could do more than has ever yet been done to help achieve that object? But if the state wouldn't do this, why shouldn't the bar itself? And why shouldn't the law schools team together with the bar and both contribute to the expense of an undertaking which is equally important to both?

Here again let us not be penny wise and pound foolish, if by the expenditure of a few thousand dollars we can save many times that amount in terms of frustrated hopes, broken careers, disbarments, and inferior service to the public.

I have spoken thus far of the economic pressure our students are up against both in school and when they get out, and I have suggested a few ways in which that pressure might be lessened. What else are our students up against? What more could they expect from us than we are doing for them? Well, for one thing, they are more anxious for guidance during their pre-law course than any of us were in our time: perhaps because the world looks sterner to them and the future more strewn with difficulties. I think we should help them more than we do. One way would be to develop a course for them, describing not only the economic conditions of the bar but the day-to-day life of the profession—what lawyers do, what different kinds of practice there are, what sorts of men succeed, what inner solaces and trials the profession affords, and so on. And the course might include also some idea of what the law consists of: its origin and sources, for example, and the structure and function of the courts; some notion of procedure; a vocabulary; the needs of the administration of justice; and a description perhaps of the currents of reform which have been running pretty strongly now for a generation, and of the deeper problems of adjusting the law to a new age. Such a course would not only help the students in their vocational choice, but if they elected to come to law school they'd be able to start in without the painful and time-wasting confusion which most of them go through in the first few months of school.

Many of us are trying to do this sort of thing now in our Introduction to Law courses, but after several years of experimenting with such a course I have come to feel that it could more usefully be given *before* the students enter law school than afterwards. And I think it could be still more useful if it were given sufficiently early in the pre-law curriculum to enable us to indicate the bearing of the social sciences on the law and what the students should be particularly seeking for when they come to take their economics and sociology and psychology and history. Couldn't we give them sufficient understanding of the legal order of things so that they might themselves, when they dug into their social sciences, correlate those sciences with the law, however imperfectly? I don't suggest this as a substitute for our other efforts to make them see that correlation; I suggest it only as a preliminary step.

I have heard the objection that in this country we're hipped with the idea that a person can't learn anything without having had a course in it, and that we ought to stop multiplying new courses; but behind that answer lies what seems to me an unconscious, though none the less regrettable, indifference to the needs of students—the old sink-or-swim attitude which the seriousness of the problems confronting our youth bids us abandon.

There may be additional ways in which we might usefully give attention to the pre-law men. In some universities, for instance, courses in constitutional law are given by political scientists out of the case-books which we use in law school. These courses seem to work fairly well, despite the difficulty of case-study. If such a course could be preceded by an introductory one of the sort I've suggested, and both could be taught by law teachers, students who appeared to be particularly ill-fitted for law could be discouraged from going further and the qualifications of those who did exceptionally well could be brought home to them. Thus these twin courses, in addition to their other uses, would serve as a sort of trial-heat in which students could test their capabilities for law work.

What else, beside guidance in their pre-law years, are students anxious for which we might give them? Among other things, for a closer contact with practitioners. Since experience has shown that most lawyers—with some notable exceptions—are too busy to make good teachers under the exacting demands of the case system, we may have overlooked other ways in which they might contribute to the educational process. I don't mean by acting as moot court judges, or even by talks or special lectures, which are all right as far as they go but which rarely leave more with the students than the impression of a personality. There are other possibilities which might, I think, be considered.

Could we not, for example, build around a given school a group of interested lawyers whom we might call preceptors, and who would be asked to assist in some such ways as these:

Suppose that in some, or perhaps all, of the courses after the first year, we were to give the students drafting exercises involving both points of law and practical problems, and then have the preceptors correct at least a sampling of the papers and discuss in class the mistakes they had found and the way the problems ought to have been tackled. The knowledge that at least a portion of the papers would be scrutinized by a member of the bar should stimulate the students to efforts they might not make for us; and his comments in class would bite home as no ordinary lecture could ever do. This sort of device has already been successfully utilized by certain schools in a few special courses; my only suggestion is that we try it out on a broader scale and as a regular feature of course instruction.

Suppose further, if the preceptors were willing, that each were to take several students under his wing, meet with them once or twice a year and discuss their problems with them, and then toward the end of their second year assign to each a choice of topics for a thesis in the final year. The faculty could help the students in making their selections; work with the preceptors in getting up suitable topics; look over the theses to make sure that they were in decent enough shape for submission to the preceptors; and require each student thereafter to submit the thesis and discuss it with his preceptor. Here again the students would be likely to put more thought into the work, and to regard it as less of a chore, than if it were to be done for us alone.

Suppose further—and this may be altogether fanciful, but the idea intrigues me and I must in-

flict it on you,—that each preceptor, and the little group assigned to him, were to read, and discuss together once a year, a few books from a list worked up by the faculty and the preceptors—not treatises, however great, but books about men and the law in action which would crack open the imagination and illuminate the legal scene—some of the works or collected papers, for example, of men like Holmes, Maitland, Root, Brandeis, Pound, Cardozo, Berle, Frank, Robinson, Beveridge, Salmond, Arnold, Freund, Dicey, Radin—the list is endless and these are but samples picked off-hand. Students would read in preparation for an evening with a lawyer where they would not read for a quiz by us; there would be little if any bluffing or racing over some one else's abstracts; if the preceptor thought enough of the books to read them himself the students would take them seriously. But would the preceptors do this? There's the rub. I don't know; we couldn't tell till we tried; but I suspect we have overestimated the absorption of lawyers in their daily affairs and have underestimated their willingness and capacity to help in legal education; and I suspect also that we have underestimated the latent hunger for learning and discussion which lies buried within most educated adults, including lawyers, and which waits only the proper spur to reveal itself. We would, of course, have to make arrangements about books; to build up circulating libraries for students and preceptors; we might even give the preceptors the books of their choice each year. This would cost something, but a small library fee from the students would cover it.

There is, perhaps, the danger that in loading students with drafting exercises, theses and extra-curricular reading too much effort would be abstracted from their regular work; but isn't it true that most students, after they have mastered the technique of case study in their first year, have sufficient time available for other things; that many of them, in fact, coast through the second and third years without appreciable injury to their grades; and that this let-down ought to be checked by doses of fresh stimuli, particularly stimuli related closely to the life of the bar?

So much for possible ways of getting the students into closer contact with the profession. I shall mention only one other need which I think they all feel. That is for a more coherent curriculum—a curriculum which won't make them quite so bewildered about what to elect, which won't give them quite so completely the desperate feeling that there are whole hunks of important courses which time won't permit them, during their three packed years, to get within even smelling distance of.

Most schools now offer courses totalling some four and a half years of credit-time. They are usually, though by no means completely in all schools, elective after the first year. This relatively free elective system permits a student, for example, to graduate without taking any property courses, or any public law courses, after the first year. These distorted programs are probably not frequent, but I rather think some distribution among the different fields should be more generally required.

Under the existing curriculum, however, no scheme of distribution will enable a student to subject himself to all or even most of the chief concepts embodied in the different courses. There are too many courses to be covered. The recent rearrangement of various course materials, and the grouping of them in fewer units, is good for other reasons, particularly in promoting a clearer view of the forest by reducing the number of trees; but the area of the forest remains the same, or if anything larger. A straight four-year law course would come close to embracing the whole forest, but unless we cut down the quantity of non-legal education which our students are getting, and which now seems to me if anything too little, we would add to their already serious economic burdens; and furthermore I fear that all too many of them would find four years' worth of law study a wearisome and progressively tasteless undertaking. I'm afraid, in short, that they'd get bored with us and our cases before their time was up, and this I say with due apologies to those of you whose gifts are such that you could fire your auditors all the days of their lives. I think there is some danger of the creeping in of boredom even in a three-year law course; and that is another reason why, again with apologies to masters of teaching, I have suggested that more pedagogical use be made of qualified practitioners.

What, then, to do? I begin by assuming that in every course, or in nearly every course, there are certain concepts or knots of principles or methods of approach that a student ought to be exposed to if he is to have a rounded legal education. It will be said again that to know a subject it isn't necessary to take a course in it. Agreed, *if* one has time to study it independently. But if one hasn't? A man may recall very little, consciously, of the subjects he took in law school, but, compared with the subjects he didn't take, he will have a feel for them, an instinct for the ground, a hunch of what's there, a sense of the pit-falls and complications, and buried deep in his subconscious but popping forth when most needed and least expected, a net-work of details—all of which will make it possible for him to approach those fields again with some confidence and, what is perhaps more important, to know, however imperfectly, when and where they impinge on problems which come to him all bereft of signposts. For these reasons, I say it is important to expose students to those portions of all the fields which are best calculated to give them the sort of sixth sense that constitutes the essential equipment of an educated lawyer.

Therefore, I recur to the question of whether it is possible at all to attain this objective in the traditional length of time available. The suggestion has occurred to me—and in part it's by no means original—that the central concepts of many, if not most, of the subjects in the curriculum might be embodied in a series of short-form courses running along parallel with the longer parent courses, which would still be retained in their present form. Each student could be required after his first year to elect, say, two-thirds of his work in the traditional full length form and the remainder in the short form. Under such a plan a student in his three years could be exposed to nearly all of the subjects in the curriculum except a few specialties like patent law and admiralty law. He would take in the long form the courses which most interested him, or which could only feasibly be given in that form, and the balance in the short form. In each short course we would stick simply to some of the basic concepts, treat them in all respects as thoroughly as in the corre-

sponding long course, and let the rest go, giving the students perhaps a memorandum describing briefly the principal topics of that particular branch of law—a sort of enlarged table of contents—so that they could see where the materials discussed in class fitted into the scheme of things and know what they were not getting.

We shall soon know more about the possibilities of such an experiment, for next semester some of my patient and generous colleagues and I will be trying it out in a dozen different courses. My only excuse for this premature discussion, and for the reference to my own school, is that I'd like to get reactions, and to provoke, if possible, some experimentation elsewhere against which to check results.

If courses of this sort can successfully be worked out they might yield some helpful by-products. For one thing, if a student took, say, three of these courses in a semester along with the longer courses and they were given, let us say, in five-week periods of three hours a week, the pace of the student's work would be somewhat speeded up; he would have to pay the closest attention to his class room work and to keep currently abreast of the course; he simply couldn't afford to put everything off to the end as I fear he too often does now in the handsome time we allow between examinations. For another thing, the setting up of such courses would force us to experiment, even more than we are now doing, with new teaching materials and methods; we might well find, for instance, that after the first year of law we could in some courses cover more ground with equal thoroughness and efficiency, and give a more rounded picture of a particular subject, by the use of a suitable text with mimeographed problems and cases for study and class discussion. Finally the creation of a short course out of a long course would force us to re-think the long course, to decide what parts of it were really most fundamental; and this in turn would stimulate curriculum revisions, and might lead to the grouping together of some of the short courses into new units, as has already been done with some of the traditional long courses.

So far I have been discussing some of our needs as teachers and some of the needs of our students. I have done no more than string a few beads of suggestions on a tenuous thread of thought. But now I come to a more fundamental question upon whose answer, if any can be given, will depend the whole color and shape and direction of this enterprise we've inherited. That question is, what kind of lawyers do we want our students to be? And the answer to that hinges on the answer to a second question: what are our own ideals as men of law? For there never lived a teacher who did not wish, however unconsciously, that those who studied under him should share his own deepest aims. And there never lived a student with his wits about him who could not perceive the nature of those aims, however careful his teacher might be to conceal them. The very nature of education is, and always has been, that it communicates ideals, whether spoken or not. They are communicated by the look of an eye, by the gesture of a hand, by what is not said as much as by what is said. And when they are communicated they exert upon him who receives them whatever final influence his education will have in shaping his own future.

Two generations ago, when our common ancestor and his brethren and early sons were engaged in getting our enterprise on its feet, their aim was to master legal principles through the study of cases, to acquire a fresh and profounder view of the sweep and tendency of the common law. They had no time for any broader aim. Their ideal was that of the scholar burning to master a suddenly glimpsed and unexplored continent. And many a student caught the contagion of that ideal and took it with him into practice.

In the second generation, beginning as far back as 1906 with Dean Pound's famous address on law reform, the aim of the founders had been so far accomplished that our teaching fathers had time to survey the law in action as well as its substance. And they enlarged the ideal which had been handed down to them by including in it a determination to do what could be done to better the administration of justice. Accordingly, in a multitude of ways, and without losing sight of the original ideal, they joined with the bar in the great task of expediting and simplifying litigation, improving court organization and criminal procedure, and modernizing the laws generally. And this attitude of theirs pervaded the schools and played its part in moulding the aims of lawyers.

Their task remains unfinished, and doubtless always will. The enlarged ideal they have handed down to us therefore retains its validity and driving force, as our present-day activities testify. But

(*Continued on page* 246)

ALEXANDER ARMSTRONG
Chairman of Conference of Commissioners on Uniform State Laws

THE BENCH AND BAR OF AMERICA HAVE KEPT THE FAITH

Justice in America Is not Absolute but It Is Still Obtainable Here More Readily and in Greater Measure Than Anywhere Else in the World—Instead of Cringing before Its Critics the Profession Should Point out What It Has Done to Defend and Courageously Preserve the Structure That Typifies America—The Forthcoming Constitutional Convention in New York and the Problems Lawyers Must Help to Solve—Responsibility of Capital and Labor, etc.*

By Hon. John C. Knox
Senior Judge of the Federal District Court, Southern District, New York

WHEN last we gathered here to commune with the spirit of the law, and dally a bit with that of Bacchus, our minds were at peace, and our hearts serene. A political campaign was over and done, the administration at Washington, more popular than before, continued to occupy the seats of the mighty; the tides of prosperity, though running strongly, appeared far from flood; governmental institutions seemed firm and deeply rooted in records of splendid performance; little concern was being given to problems abroad, and we felt the delightful glow of an era of good feeling.

With enthusiasm and gusto, therefore, we ate, drank, talked and were merry, being certain that God was in heaven, and that all was right—at least with ourselves.

Upon the face of the record as it then read, ample support for these conclusions might easily be found. From events and circumstances which, with the rapidity of lightning, followed our dispersal to our homes, I am now convinced that somewhere and somehow, someone overlooked a whale of a lot of relevant evidence. Had it been uncovered, inferences altogether different from those that were drawn would have been indicated. Many other persons, I imagine, particularly those connected with financial institutions and industrial enterprises, are quite likely to indulge thoughts that they, too, were mistaken in their reading of the portents in the sky. Bankers, for instance, many of whom are now wearing gas masks and living in bomb-proof cellars, are fully aware that they can no longer be upon the loose. Men of Big Business, also, have reason to be forming judgments that they are shortly to be dethroned, and their edifices demolished, speedily and completely. These persons, however, may comfort themselves with the knowledge that, in budgets built upon huge deficits, and which bankers are forced to finance, there are provisions which will enable both business men and bankers, when the time of necessity arises, to go upon home relief. In this country, we have established the principle that no one, even though he be a business man or a banker, shall starve. This is in pursuance of a policy of preparedness. Some day, it may be—but in the remote and distant future—we will have need of the services of persons who presently are spurned.

As for the judiciary, I may say that its immediate lot is somewhat better than that of either bankers or business men. It must be added, nevertheless, that only recently there was considerable reason to believe that the black robes of judges—symbolic of the darkness in which they grope their ways—would be stripped from their shoulders, and that the men who once wore them would be driven to the shadows of the night, wherein they were conceived and born.

For the moment, at least, this fate will not be inflicted upon us. The compassion and grace of humanitarianism, accompanied by a generosity of spirit and leniency in judgment, engendered, possibly, by certain action upon the part of Senator Burke and his adherents, have been bestowed upon the judges. Instead of being wholly deprived of authority, those of us who compose the federal judiciary have been granted opportunity to reform our ways and, mayhap, rehabilitate ourselves in public affection and esteem. In other words, we are on probation. Its terms are these: We must ever be youthful, as well as alert and alive to the needs, wishes, desires, and even the whims, of those who live life in the more abundant fashion. In order to avert the ravages of time and decay, and avoid senility, we must exercise regularly, diet carefully, remembering always that spinach and buttermilk are possessed of great nutritive values and have a high content of vitamins. Furthermore, we have been enjoined to sleep at night instead of upon the bench. Should there be the slightest departure from any one of these conditions, we face the dire certainty that some fine morning—if it be that our astigmatic eyes can take note of the dawn of the new day—we shall awake and find ourselves functus officio. "Sic semper tyrannis" can then be said of us, and, more appropriately than ever before, "E pluribus unum" will be the motto of the United States.

In my endeavor to reassemble some of the happenings of the past year, I have a recollection to the effect that even lawyers can not be said to be complete models of professional propriety and righteousness. I seem to recall having read that many of the most gifted members of the bar—and who among you is not gifted—are engaged in a conspiracy to take advantage of legal technicalities, in order that desirable social and economic reforms may be rendered sterile and abortive. Intimation also has been given that in effecting the object of your designs, you have been the recipients of aid and comfort on the part of federal judges. Thus it is that the chasm between the people on one side

*Address at the Banquet of the Sixty-First Annual Meeting of the New York State Bar Association, New York City.

and the courts on the other is being widened and deepened. Inasmuch as I am not presently sitting in the criminal term of my court, you are not now required to plead to the indictment filed against you. But, be assured, the hour of your arraignment is not far distant, and none knows the day on which it will strike. Prepare ye then for the ordeal of fire and brimstone. Asbestos, it would seem, will soon be at a premium.

But, speaking seriously now, and in all honesty, it is my belief that far too many of the charges of fault, more than enough of the allegations of wrongful conduct, too large a quantity of the innuendos that have been directed against lawyers, judges, bankers and business men have some basis in fact. I am, however, possessed of a feeling that when generalizations are so broad and inclusive as to make it impossible for the public to differentiate between men who are patriotic, and devotedly loyal to the public good, and those who are recreant to the trusts reposed in them, the ultimate result of broad and poorly considered generalizations is likely to be more harmful than good. When hatred is aroused and hot passion invited, the persons animated by these emotions cannot be expected to discriminate between things that are good and those which, rightfully, should not be tolerated. Mass movements, once they get under way, may very well destroy objects that should be preserved quite as readily as they will wipe out those upon which vengeance should be wrought.

In this connection, another observation is pertinent. It is this: In beating the drums of war, a grave responsibility rests upon him who wields the sticks. If the drums sound too loudly, they may summon savage forces which, having been angered and being undisciplined, will be so unruly as to advance far ahead of their lines of supplies, and be without proper sustenance and support when these are needed most. Failure of the movement—even disaster to a righteous cause—may conceivably be the consequence. In fighting battles caution and circumspection should be the orders of the day. Boldness and daring appeal to our imaginations and cause one's blood to run more swiftly. But, if my memory serves, Pickett's charge at Gettysburg, glorious as it was, did not decide the issue of that engagement. It merely reduced the number of Lee's effectives. And, it may be added, the dashing boldness of the Light Brigade failed to turn the tide of the fight at Balaklava. The classics of literature may also provide a lesson. Don Quixote, in the days of his knight-errantry, undertook to joust with a wind mill. As the legend recurs to me, the result of the encounter was more disastrous to the Don than were the injuries sustained by the structure against which he spent his fury.

Speaking for myself, I care not with what vigor the lash of punishment be laid across the back of any man who falls short of the full performance of public or private duty. Let him and his kind be separated from the mass of persons who are engaged in honest and legitimate enterprise. When this has been done, let the offenders, according to the processes of law, make answer to the wrongs charged against them. If the charges be sustained, let the culprits pay the price which the law demands. Meanwhile, let honest business pursue the even tenor of its way, unmaligned, unassaulted and unafraid.

There is much evidence to the effect that, in the aggregate, the contributions which bankers, business men, lawyers and judges have made to the development, progress, happiness, welfare and security of America, are at least equal to, if they do not outbalance, the achievements of any like number of groups or classes than can be found in the whole of our population. Holding no detailed brief for either bankers or business men, I should like to give passing notice to some accomplishments of the legal profession.

Justice in America, unhappily, cannot be said to be an absolute. Even so, it is here obtainable more readily, and in greater measure, than anywhere else in all the world. It is to be had as respects encroachments by individuals upon the rights of their fellows, and—thanks be to God—it may likewise be had when the United States, forgetting the sanctity of privileges it has guaranteed as inviolate, encroaches upon preserves where trespass by the sovereign is forbidden. What is quite as important—justice is here available without purchase, from those who dispense it and without excessive procedural price to the litigants who seek it.

Law, lawyers and judges have their faults—and they are legion, as each of us must admit. But, let our critics, if they will, search the ends of the earth for a land where right and justice prevail to a greater extent than here, where we, with all our frailties, give sponsorship to the rule of just law and decent living. When empty handed our critics shall have returned, let them admit, as they should, that in America, lawyers and judges have protected and preserved liberty when elsewhere executives and legislators were trampling it beneath their feet. Let them concede also, that in the barrage lately laid down against us they employed some poison gas and a goodly number of dumdum bullets. It is my hope that the supply is now exhausted.

Instead of cringing before, and being humbled by the critics, who heap calumny upon us, let them be advised of this:

Ever since the formation of this republic, our legislative halls and executive chambers have been occupied most frequently by lawyers. In response to the legitimate demands of their constituencies, these men have enacted innumerable measures that have been of outstanding service to our people. Upon occasion, no doubt, these same men have listened too attentively to the supplications and importunities of organized minorities. Sometimes, also, they inclined their ears all too favorably to the demands of tyrannical majorities, and gave heed to the frenzied cries of timidity, cowardice and political expediency. From time to time, therefore, the country has been subjected to legislation that was subversive of liberty and constitutional right. In practically every such instance, other lawyers, free and independent of compulsion and pressure—unaffected by political considerations—at periods, when elsewhere, governments were falling and crowns were rolling—have valiantly defended and courageously preserved the structure that typifies America.

The judicial establishments of this land—both State and Federal—with fair consistency, strongly, and on the whole, ever readily have done their full duty in upholding free speech, in vindicating the rights of free assembly and in maintaining a free press. And, these things, I aver, constitute the fundamentals of free government. It would thus appear that, as regards the more essential features of our concept of government, the legal profession has run the course of duty, and kept the faith of representative democracy. I sometimes doubt if, upon the scoreboard of public service, the politicians, office-seekers and hair-brained theorists who

belittle our achievements and give us their sneers, will ever post a better record.

If, as, and when they engage in efforts so to do, some of the lawyers and judges within this room, in the performance of their duties as delegates to the forthcoming constitutional convention, will have been giving their time, abilities, experience and other talents to the preservation of a form of government, which, so long as human nature undergoes no radical change, is about as good as anyone can reasonably expect or will supply. All about them, however, will be sappers and muckers who, perhaps, meaning well, will be doing more than they realize to undermine the pillars of democracy.

The convention will also be besieged by pressure groups. At the expense of the public purse, and at the cost of surrender of public and private right, these groups will be seeking special privileges for themselves. Delegates will likewise be solicited by civic minded persons, who, believing themselves to have discovered new mechanisms calculated to improve governmental machinery, and make it rattleproof, will ask that these gadgets become integral parts of the engine of the State. It may be that these contraptions, or some of them, are invested with the genius of pioneer inventions, and will perform better service than have the long used appliances with which we are more familiar. It is my hope, nonetheless, that before the newly patented articles are attached to the fly-wheels of government, each of them will be subjected to the utmost scrutiny and the severest experimentation, to the end that their worth and capacity may thoroughly be tested. Before the older machinery is delegated to the junk-pile, I trust the convention delegates will not forget their own experiences with it. They should remember, that in many instances, it has functioned superbly, even if, at other times, through no innate fault of its own, the character of its work was not all that could be desired.

One of the really momentous issues upon which the convention, in some form or other, will have to make decision, will be that which exists between capital and labor. As most persons can testify, the attitude of capital toward labor is a considerable distance from perfection. In all too many cases, by actions that are highly discreditable—and which cannot long be tolerated—capital is resisting the development of a movement which, under existing industrial conditions, is as natural and desirable as were the steps which led to the organizations which enable capital to be of greater service to its owners, and of more advantage to the public, than would have been possible without those organizations.

The wide unionization of labor is here, and it is here to stay. As the days go by, the power and influence of the unionization of labor will increase and multiply. Whether or not capital relishes the fact, it is one that capital must accept. The sooner it is accepted, and the more cheerful the spirit of acceptance, the easier will be the adjustments that necessarily must come about.

But, if capital's attitude towards labor is open to disapproval, the bearing of labor towards capital is not of superior standing, and is entitled to no paean of praise. On the contrary, some of the exhibitions attributable to labor are open to condemnation upon the part of every right thinking man. In every sense of the word, the sit-down strike is a vicious instrumentality, and must never be condoned. It is the antithesis of democratic right, and stabs at the hearts of private property. If the rights of property undergo destruction, those upon which individuals have been accustomed to rely will quickly be upon the wing. As industry is now carried on, sit-down strikes subject the rights of a majority of workers to the complete domination of a small minority of their number. Not only this, but they constitute a constant threat to the public at large, and are an open invitation to violence and bloodshed. As respects the public welfare, the interests of both capital and labor are of subordinate importance. The public must be alert to see that the respective rights of capital and labor, whatever they are, shall be recognized and vindicated. Meanwhile, however, arrangements must be devised whereby it will not readily be possible that disputes between capital and labor shall disrupt our commerce, breach the peace, inflict losses upon everyone, and, perhaps, deprive us of the necessaries of life. When all is said and done, both capital and labor are dependent upon the public, and public right must ever be paramount.

In order that full justice may be accomplished, it will be necessary that labor unions, quite as much as aggregations of capital, be not only rendered capable of being reached by processes of the law, but each of them must be open to the imposition of full responsibility for its activities. So long as some unions are the personal possessions of dictatorial, selfish and unsocial leaders; so long as union funds, totalling vast amounts, need not be the subject of an accounting, and are utilized for political purposes and the ends of violence; so long as strikes and walk-outs, whatever the wishes of a majority of the workers, can be declared by the ipse dixit of irresponsible men, the interests of workers, as well as those of capital and the public, are seriously jeopardized. It were better that now, rather than in the future, the law should assume the task of seeing to it that peace and order, as well as security for both capital and labor, instead of strikes, turmoil, and internecine warfare, should at all times prevail. Perhaps the Constitutional convention can devise the means whereby the law shall fully come to this strife-torn land. If this be not possible, the day is not far distant when some other agency must perform the task. I dare say that, when performance shall be a reality, lawyers and judges will be credited with having done a substantial portion of the work.

Death of Mr. A. T. Stovall of Mississippi

The recent death of Mr. A. T. Stovall, of Okolona, Mississippi, removes a distinguished member of the Association. He joined in 1908 and served in many important capacities, among them as member of the Executive Committee and member of the General Council. He was also for a long period a member of the National Conference of Commissioners on Uniform State Laws and took an important part in its activities. Mr. Stovall was one of the leading lawyers in his State and combined with his legal knowledge and experience a remarkable business ability which resulted in his selection many years ago as President of the Columbus and Greenville Railroad—an intrastate line in Mississippi. His energy and ability resulted in a remarkable improvement in service rendered by this corporation. A man of unusual personal charm, he will be sorely missed from the councils of the various organizations which were fortunate enough to attract his interest and secure his support.

KANSAS JUNIOR BAR SETS GOOD PRECEDENT

Gives "Welcoming Banquet" to Newly Admitted Lawyers—Plan May Become Permanent

THE Kansas Junior Bar, with the cooperation of the Kansas State Bar Association, has set a precedent which will no doubt receive the careful attention of Junior Bar Conferences in other States. It occurred to the active and enterprising young lawyers at the head of the Kansas Junior Bar that it would be an excellent idea to devise a plan to welcome the young lawyers who had just successfully passed their examination, and been sworn in by the Supreme Court of the State, into the general fellowship of the profession; also to do something to make them "Association-minded" at the very outset of their careers.

These ideas took the concrete form of a "welcoming dinner" given in Topeka, Wednesday evening, February 9, immediately following the Kansas bar examinations and the admission of the successful applicants to the bar by the Supreme Court. All reports indicate that the affair was an entire success. The Chief Justice of the State Supreme Court was present and addressed the gathering, and Hon. W. F. Lilleston, of Wichita, prominent lawyer and Secretary of the State Board of Bar Examiners, also made an address. Both addresses were well received. These two speeches and the invitation extended to the guests to join the Kansas Bar Association and the American Bar Association constituted the entire program. Mr. Philip H. Lewis, State Chairman of the Junior Bar Conference, presided.

No attempt was made during the course of the dinner to solicit memberships, as it was the general opinion of those present, and especially the older lawyers, that the meeting would lose its effect if it were turned into a general membership campaign. However, an envelope containing applications for membership in the two Bar Associations and literature explaining the benefits of membership was placed at the plate of each new lawyer. The name and address of each of them was then turned over to the State membership chairman, who will do whatever follow-up work seems desirable.

The significance of the occasion was indicated by the very satisfactory attendance. Seventy-one were present and this number included twenty-three of the twenty-six who had successfully passed the bar examination. Among the remaining persons present were four Supreme Court Justices, the United States District Judge, two members of the State Board of Bar Examiners, Mr. Robert Stone, a member of the Board of Governors of the American Bar Association; the President of the Women Lawyers of Kansas, the Dean of the University of Kansas Law School, and many prominent members of the profession throughout the State.

It was the consensus of opinion of those present that the plan for a "welcoming banquet" to newly admitted members was very worth-while and that a precedent had been established which should be followed in the future. Arrangements are already under way for an affair of this kind for the class taking the bar examinations in June and it is believed that each succeeding class of new lawyers will look forward to the meeting.

Answers to a questionnaire recently sent out to each State chairman of the Junior Bar Conference indicate that such a plan is feasible in many of the other States, especially in those where each class of

new lawyers is inducted into the profession just after they have passed the bar examinations and while they still remain together in a group. While of course each State has a situation peculiar to itself, it is believed the experience and information gained by the Kansas Junior Bar will be helpful to them.

In this connection it may be mentioned that those who are largely responsible for the success of the Kansas "welcoming dinner" believe that, where feasible, short talks to law school seniors should be given by Conference members, explaining the bar organizations and their purposes, prior to the bar examinations. This was done at Kansas University, where Mr. Frank Eckdall and Mr. John W. Breyfogle, Jr., presented the work of the American Bar Association to the law school seniors. Their talks were very well received and helped create atmosphere for the "welcoming banquet" which followed later.

The dinner was put on by the state Junior Bar organization as a joint project of the Meetings and Arrangements Committee and the Membership Committee, of which Erle W. Francis and George Stallwitz are the respective chairmen. From the personnel of these bodies a special joint committee was named to handle the specific task of promoting interest in bar association work among law school students and newly admitted members of the bar, and it was this joint committee, officially entitled the Committee on Program Extension among Law Schools and Law Examination Classes, which arranged for the dinner.

Mr. James W. Porter, of Topeka, as Chairman, had immediate charge of all the plans for the dinner and program, and discharged his task so effectively that he and his associates have been asked to make arrangements for the next meeting, to be held in June. The other members of the committee are: Conrad Miller, Kansas City; Richard Barber, Lawrence; and Mark Bennett and Walter L. Shaffer, Jr., of Topeka.

Contributing powerfully to the success of the project were the aid and support given by the Kansas State Bar Association, through its Secretary, Hon. W. E. Stanley, of Wichita. It is understood that this support will be continued as long as both organizations feel that the undertaking is worth-while. Of the members of the Junior Bar of Topeka, whose efforts in making the occasion a success were particularly notable, special mention is made of Messrs. John H. Hunt, William Gray, Robert Clark and Marlin Casey.

Mr. Philip H. Lewis, New England Building, Topeka, Kansas, is State Chairman of the Junior Bar Conference, and will no doubt be glad to give further information as to the project to those who may wish it.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

CHIEF JUSTICE WAITE, DEFENDER OF PUBLIC INTEREST, by Bruce R. Trimble. 1938. Princeton: Princeton University Press. Pp. 320. In these days when the public is so interested in everything pertaining to the law, and especially the administration of justice through the courts, Dr. Trimble's "Life of Chief Justice Waite" should find a wide circle of readers. Fortunately it is not too long and is written in a style which makes clear to the layman the decisions which have marked, for the period, the expansion of the Constitution in the interest of the public. The reader here finds a concise statement of the reasons which moved the Chief Justice to many of his conclusions.

Biography, which has become of late so fascinating, is apt to be merely a story of the past; not so with a book like this, which must link the life story to the life of the Constitution. Waite has passed away; his work still lives; we can see it in operation every day. The large social program which has caused so much praise or criticism in its attempt to meet the present financial and economic troubles, finds its limitations or its approval in the decisions of the court during the fourteen years of his service on the Supreme Court bench. The struggle to find the truth and the light was the same in his day as in ours and brought the same divergence in views. Very comforting is it to note the criticisms occasioned by the decision of *Munn v. Illinois*, 94 U.S. 113, decided in 1876. From press and law review Dr. Trimble has been to some pains to collect these, which have a very familiar tone. We hear it or read it now every time a court tries to bring the law into harmony with the times; that is, make it work. "An advanced guard of a sort of enlightened socialism," "It is relied upon to sustain yet more communistic and destructive legislation" and the like comments have saluted many later decisions of the courts.

But the value of this book lies not so much in the analysis of cases and Waite's connection with them, or the development and growth of the nation, its enterprise and legislation, as in the revelation of the power which a strong, forceful man of good principles has over a nation and events. When we pause to think of it, how mysteriously, even miraculously, virtue has ruled the world—ultimately ruled! Out of all the evil and corruption of the ages we have left to us the best literature, the finest pictures, the greatest music, the inspiring speeches and orations lifting men to dreams of liberty and justice. No laws have given these to the world, just the innate goodness in man, who in-

stinctively knows good from evil, reality from sham. We put down this Life of Chief Justice Waite feeling we have been in the presence of a man—strong to do his duty—seeking to lift the law to a higher plane of usefulness, and justice for all people under changing conditions, a simple man not swollen with pride or vanity, a good man loving truth and honor. How empty words are to convey an impression! Sincerity is felt when it cannot be described. May it not all be summed up in the sentence found in Prof. Abbott's *Conflicts with Oblivion:* "He did his work before he went his way." This nation has been peculiarly blessed in having had many such men in high office, and particularly on the Supreme Court. The author says: "History may not place him among the most illustrious Chief Justices of the United States. His success was not attained because of any particular genius." That is why I am writing of this book and why you are reading it. We want no geniuses on the bench—they are out of place. No one can tell what day their genius will be working. Given the patient, steady, hard-working judge, willing to listen and to learn, with a keen sense of justice, and courage to reach it, and we have about as good a man as we can get. He will not be classed either as a conservative or a liberal—whatever these terms may mean—but a "good judge."

The author has given us some sidelights on the work of the Supreme Court in Waite's times, which are delightful, especially to the judiciary of this day; so much does human nature assert itself. Correspondence shows that some of the justices were either dissatisfied with the opinions assigned to them to write, as not of sufficient importance, or else felt they had been overcrowded with work. The Chief called back some of these and wrote the opinions himself. Chance remarks misunderstood caused apologies to be exchanged, the Chief Judge, as must any judge, realizing that no good results ever came out of bad feeling, which creates a tainted and stifling atmosphere. Many a timorous suggestion, fearfully put forth, has started further thought and saved the day, while bluster and domineering have frequently caused havoc. One thousand opinions in fourteen years—so the author says, and it must be so. This seems an enormous output, especially when we are told that one opinion in the Telephone cases takes up a whole volume—156 U. S. This represents an extraordinary amount of work, indicating that the Chief Justice took more than his share of opinions to write. No doubt the sickness of Justice Hunt for years, and the absence of Field and Miller much of the time, made this necessary. The equal application of the laws did not apply to the Supreme Court. We get some idea of what this means in comparison with other courts, such as the Court of Appeals of New York, where on the average each judge writes about forty opinions a year, more or less, which of course do not include reports in cases affirmed, or motions.

Some things in Waite's life furnish a lesson for the day. When mentioned as a candidate for the Presidency, Waite wrote: "There can't be a doubt in these days of politico-judicial questions, it is dangerous to have a judge who thinks beyond the judicial in his personal ambitions." The strength of our courts lies not in the fact—if it be a fact—that the judges are able men learned in the law, but rather that by their lives they have the confidence of the people. Patience, courtesy, hard work and a desire to stay a judge—a career man—adds to this confidence. How the States get such good men for judges with terms of six years only has always puzzled me. More and more we should conform to the Federal system for the sake of efficiency.

The author says: "Beginning with the Munn case, the court was constantly divided. The cause of this division, which began about 1877, has been said to be due to the difference in the governmental philosophies of the members of the court." This is as it should be. So many people think an unanimous court means strength, and dissents weakness. Just the reverse. Opposition develops every point and argument *pro* and *con;* it sifts every phase of the case and calls for the very best that is in men. It is when our views are challenged that we wake up to re-examine our position to see if we have been drifting. Reason, not blind reliance on the past, must support our conclusions. Prof. Whitehead in his "Adventures in Ideas" reminds us that "successful progress creeps from point to point testing each step." There must be in judicial decisions no wild jumps.

But I must not tarry over this work of Dr. Trimble's which arouses so many thoughts. The importance of Waite's views lay in their direction—forward, not backward. Of the Munn case the author truly says: "It established for the first time the doctrine of the public interest subordinating the great corporations to the will of the State. Verily it emancipated the American people and is undoubtedly one of the most important decisions in our Constitutional history." Again, "the widest discretion was to be left to the States' constituted authorities. This was the dominating characteristic of Waite's decisions."

We have heard that the Constitution is what the judges say it is. I prefer to think that the Constitution is what the judges *are*. A man may say many things of which in his innermost heart he has grave doubt. Sincerity is a rare jewel. Thus the author of this book emphasizes these points in Waite's character: "He had a sturdy, common sense which is the basis of intellectual power and which is the master root of all justice and law."

To quote again the words of Prof. William Cortez Abbott, because they seem to apply to Chief Justice Waite: "The greatness of men lies in what they do for the world, not what the world does for them or what they do to it."

Waite died poor; but he helped to make richer and happier the lives of many who never knew or heard of him.

FREDERICK EVAN CRANE.

Brooklyn, New York.

The Mind of the Juror as Judge of the Facts: or The Layman's View of the Law, by Albert S. Osborn. 1937. Albany: The Boyd Printing Co. Pp. 239.—This entertaining, instructive and challenging book should be read by every practicing lawyer. The author is well known to the profession,—to many who have availed themselves of his services as an expert witness on disputed writings, and generally through his previous publications, "Questioned Documents" (1929) and "The Problem of Proof" (1926).

While "The Mind of the Juror" will appeal particularly to the trial lawyer, the auhor's well-considered suggestions for the improvement of both civil and criminal procedure should interest every member of the profession. Mr. Osborn's forty years of experience as a witness, which has taken him into practically all of the trial courts of the United States and Canada, has afforded him a unique opportunity to compare and evalu-

ate legal processes. The result, as Dean John H. Wigmore says in his interesting introduction, is the "first wise book" of observations of the courts at work by a person in the "detached position" of an "experienced witness."

Nothing has escaped the keen perception of this experienced witness and there is not a phase or incident of the jury trial from the voir dire to the return of the verdict that he has not commented upon. While there is considerable restatement of material common to previous works on trial practice and tactics, the writer of this comment found much that was new or very differently presented in the chapters on "The Jurors Look at the Lawyers," "The Jurors Look at the Witnesses," "The Juror Looks at the Contentious Trial," "The Psychology of the Court Room," "Steps toward Persuasion," "Prejudice," and "Tactful Tactics." Space limitations preclude detailed comment on all of these chapters. The one dealing with "The Psychology of the Court Room" will suffice as an example. Mr. Osborn breaks down this overworked abstraction into recognizable concretes,—essential understanding by the advocate of the emotional and non-emotional elements of his case, selected of a jury best fitted by education and experience to appreciate and react to that type of case, appraisal of the mental and moral level of the selected jury, effective sequences in the presentation of oral and documentary evidence, and a studied choice of language calculated both to elicit the desired facts from the witness and persuade the jury of their significance.

The book abounds in practical suggestions to the trial lawyer—young and old. He urges cultivation of the "art" of asking questions. Wisely he says, "it requires as much and sometimes even more intelligence to ask questions than to answer them." Specifically he asks, why will a lawyer, in interrogating the average type witness before an average type jury, use "prior" instead of "before," "executed" in place of "signed," or "subsequently" rather than afterward"? Can we not all accept his conclusion that "leaving out perhaps a hundred words from the number lawyers habitually use would make intelligible to many hearers much that is not understood when their 'favorite' terms are used"?

The author has supplemented his exceptional experience by a wide reading of current legal literature, and his opinions as to the reasons for the many failures of justice in jury trials merit serious consideration. Particularly he emphasizes the necessity of divorcing the courts from politics, an assurance of long tenure to judges of proven integrity and ability, the dignifying of jury service through the selection of more intelligent veniremen and improvement in the physical conditions surrounding their deliberations, the simplification of trial procedure, and the abolition of the absurd requirement of unanimous verdicts in civil cases.

It is to be hoped that this sincere and timely book will be widely read by the Bar.

Chicago, Ill. FRANCIS X. BUSCH.

Labor's Road to Plenty, by Allen W. Rucker. 1937. Boston: L. C. Page and Co. PP. 220.—The author of this book is a pricing expert, sales counsel and "practical" business economist. He is utterly opposed to what he describes as the un-American policy, or the "alien" policy, of trying to improve the position of labor, or to promote national prosperity and stability, by means of government regulation of wages and hours, by labor boards and collective bargaining, by strikes and unscientific arbitration, and the like. The whole trouble is, he aserts, that we have ignorantly and shortsightedly departed from the "American" policy of trusting natural economic forces and permitting economic laws to insure steady economic and social progress. Industrialists, like labor leaders, lawyers and politicians, have been advocating and adopting the wrong remedies for such ills as unemployment, low wages, sweatshops, child labor, monopoly, abuses of installment buying. The only way to restore prosperity on a sound basis is to increase productivity and to maintain a balance between consumer's income and industrial prices.

Mr. Rucker admits that his has been a voice crying in the wilderness. The American people have been too perverse to listen to reason, and our fate is likely to be the same as that of unhappy Europe, which never quite got rid of feudalism and never knew freedom. America *had* a natural, free, healthy system, and might revive it, if it only would!

One finds no recognition whatever in Mr. Rucker's diagnosis and treatment-program of the part played by free land and abundant natural wealth in the development of America's economic system. In deploring high prices, he stresses a hundred times the folly of labor in fighting for highly hourly wage rates, and passes over, without adequate discussion, the folly of monopolistic industries, of what is called finance capitalism, of frenzied speculation, and of reactionary management; of the unsolved problem of technical unemployment, of the effect of the exhaustion of free or cheap land, of excessive protection to inefficient "infant" industries, of credit manipulation and over-centralized banking. His American system, in fact, existed only while we had a continent to conquer and exploit. Subsidies, bounties, favors, discriminations, political corruption, gross inequalities have long marred and vitiated the beautifully simple—on paper—American system, and neither the farmers nor the workmen can be blamed for insisting on government aid and support of certain special types that will enable them to maintain a decent standard of living.

Mr. Rucker's Utopia is as unattainable as that of the "classless" Marxian communists. His remedy, like that of the Brookings Institution, is impossible, and we shall be forced to muddle through, learn from our trials and errors, and beware of dogmatic theorists and their cure-alls. The soundest thing in America is its pragmatic or "instrumentalist" philosophy and its belief in the democratic process.

Lewis Institute, Chicago. VICTOR S. YARROS.

Law and the Modern City. By Barnet Hodes. 1937. Chicago: Reilly & Lee Co. Pp. 112.—This little volume, written by the Corporation Counsel of the City of Chicago, contains the substance of lectures delivered by him at Northwestern University Law School with a brief preface by the author and an introduction by Leon Green, dean of that school. The subjects principally considered are: the rule of strict construction of municipal powers, the disadvantages of great cities being governed by state legislatures without the right of home rule, the unsatisfactory state of the law relating to tort liability of municipal corporations, the problem of overlapping governments and federal impingement, and modern municipal law departments.

As to the first of these, the author complains with understandable warmth of the prevalent law that municipal corporations are creatures of the state and that the law of municipal corporations really amounts to the "law of municipal limitations" (p. 36). Re-

straints on municipal powers are applied with extreme rigor in Illinois. To the list of cases cited by Mr. Hodes showing how strict construction has interfered e.g. with Chicago's attempt to regulate second-hand and junk dealers may be added *Bullman et al v. City of Chicago et al.*, and three other cases, decided in October, 1937, by the Supreme Court of Illinois, 10 N. E. (2d) 961. Under a statute authorizing the city to tax, license and regulate dealers in junk, rags and "any second-hand article whatsoever," the doctrines of strict construction and of *ejusdem generis* were applied with the result of preventing regulation of dealers in second-hand motor vehicles, trailers, tires, accessories and parts. The decision seems especially drastic in view of the addition to the cities and Villages Act after the decisions referred to by Mr. Hodes, of the words, "and any second-hand article whatsoever." On the other hand, Mr. Hodes should get some comfort from cases like *People ex rel. Sweitzer, County Collector, et al. v. City of Chicago et al.* 363 Ill. 409 (1936,) 2 N. E. (2d) 330, a holding that express power to create and regulate parks gives implied power to operate a nursery to supply park needs.

The Declaration of Independence, Mural in National Archives at Washington, by Barry Faulkner
sylvania; 2. Samuel Chase, Maryland; 3. Charles Carroll of Carrollton, Maryland; 4. Stephen
Delaware; 7. John Dickinson, Pennsylvania; 8. Abraham Clark, New Jersey; 9. William Ellery,
chusetts; 12. Benjamin Harrison, Virginia; 13. Samuel Huntington, Connecticut; 14. Thomas
chusetts; 17. Robert R. Livingston, New York; 18. Benjamin Franklin, Pennsylvania; 19. Richa
North Carolina; 22. Edward Rutledge, South Carolina; 23. Lyman Hall, Georgia; 24. Josiah Ba
New Jersey; 27. George Wythe, Virginia; 28.

The remedy for such hobbling of municipal movement is, as the author indicates, home rule. Chicago, we are told (p. 11), is the only city of over a million population that does not have home rule, although thirty-six states still do not permit it (p. 12). When more than half of the population of New York State is included in the corporate limits of New York City and about forty-five per cent of the people in Illinois live in Chicago (p. 17), it seems ridiculous that our greatest city should possess only a limited home rule and our second largest none at all and be governed by rural areas that have a fear of urban communities (pp. 21-2). While the author terms this fear "absurd," a substantial part of it is due to the fact that the rural representatives in the governing body are properly suspicious of city legislators and know that they are frequently the tools of city bosses and special interests. Thus the real needs of the cities are inadequately presented by persons in whom their legislative colleagues have no confidence. Still, one cannot but deplore the plight of a great city which does not enjoy the benefits of home rule and is obliged to struggle under a governing act which, with amendments, approximates over six hundred thousand words (p. 35).

With most of the author's observations on tort liability of municipal corporations the reviewer is perforce in agreement, since the book cites (note 11, p. 103) and quotes (pp. 57, 64) from the reviewer's article on this subject in 22 Virginia Law Review, 1910 (1936). One may dispute, however, the Corporation Counsel's conclusion that, if municipalities were liable for torts to the same extent other corporations are, Chicago would find personal injury and property damage cost rising to the millions of dollars, that "ambulance-chasers" would have a specially created "heaven" and that the treasuries of large cities would be pinched and smaller cities conceivably bankrupted (pp. 62-3). The cities could take out insurance and, like street railways, railroads and other corporations often sued in tort, frequently prevent recovery by showing contributory negligence. They have a cerrtain advantage, too, in that their "stockholders" (i.e., residents of the municipality and sometimes taxpayers) are on the juries. If bar associations do not sufficiently discipline "ambulance-chasers", that is no reason why persons entitled in justice to a remedy should be denied it.

The disadvantage of four hundred and nineteen separate governments before 1935 in Cook County, Illinois, (p. 66), and the growth since 1933 of federal-city relationships, are discussed; but an adequate review of the difficulties and complexities they engender would itself be a large tome.

Mr. Hodes has skilfully reorganized the Chicago Corporation Counsel's office, which employs nearly one hundred lawyers (p. 10). A research division, not composed of lawyers but of "political scientists and men schooled as fact-finders, trained in economics and the social sciences as well as in some phases of public law" (p. 94) is something of a novelty in municipal law offices. The whole chapter dealing with the Chicago Municipal Law Department seems, however, somewhat unrelated to the rest of the book and one wishes especially that there had been omitted the paragraph on p. 92 beginning with the sentence:

> "We have found, too, that effective service can be rendered even though members of the staff do enter the department through what might be called the political route."

For lawyers to get employment in a municipal law department or elsewhere by the "political route" tends to debase the practice of the law and sometimes results in allegiance being divided between the public client and the politician patron. Is it unreasonable to hope that in the not too distant future assistants in public law offices will be appointed and serve under the merit

y Barry Faulkner. The personages, reading from left to right, are: 1. Robert Morris, Pennand; 4. Stephen Hopkins, Rhode Island; 5. Samuel Adams, Massachusetts; 6. Thomas McKean, William Ellery, Rhode Island; 10. John Witherspoon, New Jersey; 11. John Hancock, Massaut; 14. Thomas Jefferson, Virginia; 15. Roger Sherman, Connecticut; 16. John Adams, Massalvania; 19. Richard Henry Lee, Virginia; 20. Thomas Nelson, Jr., Virginia; 21. Joseph Hewes, gia; 24. Josiah Bartlett, New Hampshire; 25. Thomas Stone, Maryland; 26. Francis Hopkinson, the, Virginia; 28. William Floyd, New York.

system?

Altogether, Mr. Hodes's little volume is readable, informative and useful for those interested in the multiple problems of local government.

MURRAY SEASONGOOD.

Cincinnati.

The Clermont Assizes of 1665, translated from Abbé Fléchier's "Memoires sur les Grands Jours d'Auvergne," by W. W. Comfort. 1937, Philadelphia: University of Pennsylvania Press. Pp. 291.—No criminal case reported in the daily newspaper is fresher with flavor and human interest than Abbé Fléchier's account of the famous special trials held at Clermont in France in 1665 to check lawlessness in the province of Auvergne. The book, formally titled "The Clermont Assizes of 1665," and subtitled "A Merry Account Of A Grim Court," is presented in English for the first time. The translator is W. W. Comfort, president of Haverford College.

The book recommends itself to lawyer and layman alike not only for its historical and legal significance but also as a true and interesting commentary on social conditions in the France of the time.

Pointing out that the nobles of Auvergne were particularly recalcitrant about taxes and in their general conduct, Louis XIV selected a court of Paris justices to go to Clermont, bring all offenders to the bar, and punish them accordingly. Like the Roman state where the head was the source of all authority, Louis XIV was determined to concentrate power in his crown.

First to be arrested and brought before the court was Viscount de la Mothe de Canillac, a man held in great esteem in the province and in the opinion of many the most innocent member of the Canillac family. Abbé Fléchier gives a vivid running account of this trial and vouchsafes that the King's judges may have been a little shortsighted in the peremptory arrest of M. de la Mothe. Many other nobles made a hasty departure when the arrest was made and so, Fléchier observes, "in order not to miss the capture of a man who was only half guilty, the King lost the chance of arresting a hundred criminals."

The reader may find some relation to present-day world politics in the struggle between the State and the feudal nobles for the centralization of governmental authority. Such a suggestion is made in the foreword by Justice William B. Linn of the Supreme Court of Pennsylvania.

A reader also might find modern analogy in Fléchier's observation on tax burdens of his time. "It used to be that everyone enjoyed his property in peace and did not have to pay anything until he married. Then the tax was reasonable, and plenty of time was allowed for it to be paid. Would to God that it were the same with all our taxes nowadays!" he comments.

Although all of the memoirs—recorded in 291 pages—are realistically concerned with tragic facts, they have a light, colorful, and entertaining character. They show Esprit-Valentine Fléchier a poet, scholar, and man of the world with a seventeenth century pleasure in gossip and light-hearted wit. It was simply chance that he was in Clermont with the special court. Fléchier was destined to become one of France's most distinguished clergymen, but in 1665 he still was tutor in the home of M. du Caumartin who was one of the judges selected by Louis XIV. He wrote the memoirs to amuse Mme. du Caumartin and the mixed society of her salon.

It is a measure of progress, perhaps, that life is no longer just a salon of gay and interesting pleasantry but rather a laboratory of deeper thought.

RUTH DE YOUNG KOHLER

Kohler, Wisconsin

Summaries of Articles in Current Legal Periodicals

KENNETH C. SEARS
Professor of Law, University of Chicago

BILL OF RIGHTS

A Plea for Withdrawal of Constitutional Privilege from the Criminal, 22 Minnesota L. Rev. 200. (Ja. '38; Minneapolis, Minn.)

A challenge is thrown at the lawyers who seem to think that our national Bill of Rights is almost perfect. The challenge is equally applicable to the state constitutions. The thesis is that the privileges against self incrimination and unreasonable search and seizure protect the criminal, the arch-criminal, and his ally, the lawyer-criminal, and nobody else, except occasionally "the small offender." Apparently the privilege against double jeopardy receives a limited condemnation. "Let the most ardent advocate of constitutional privilege to the criminal point out a single case in all the annals of American jurisprudence where an innocent man has been, or

could have been, convicted because compelled to answer questions about the crime of which he was accused." A similar assertion is made concerning the search and seizure privilege although it is later stated that: "The infringement of privacy in respect to personal papers and effects may be the subject of some abuse; but this can be cured by statutory safeguards much better than by universal privacy as a constitutional right, including the right of the criminal to suppress evidence of his own guilt." There seems to be merit in these challenges even though some of the argument appears to be partisan and emotional rather than an objective attempt to search for the truth.

CONSTITUTIONAL LAW

Is Our Constitution Adequate for Present Day Needs? Robert L. Howard, 23 Washington U. L. Rev. 47. (D. '37; St. Louis, Mo.)

The answer to the question depends upon which constitution is meant; the one that came from the framers and was expounded by Marshall, Holmes, Brandeis, Stone and Cardozo; or the one that was applied by a frequently prevailing majority during the last fifty years. The first constitution is satisfactory but the second will not serve adequately. Such is the basis for an interesting general discussion of our constitutional interpretation from the days of the formation of our national government to the summer of 1937. The drama sweeps before the eyes. Liberals will be pleased; conservatives probably will frown and hope for a return of the good old days. But if the author is correct the "good old days" are not the days of John Marshall but start after the civil war.

JUDICIAL SERVICE

The Retirement of Federal Judges, Charles Fairman, 51 Harvard L. Rev. 397. (Ja. '38; Cambridge, Mass.)

This extensive article of forty-six pages is of rare quality. It is entertaining, instructive, and thought-provoking. A proposed constitutional amendment is presented for the solution of the problem of the retirement of our national judges. If one has any doubt of the need for such an amendment let him read the low-down truth concerning McLean, who became "wholly incapable" for service at the December, 1859, term but served until he died in April 1861; Grier, who could hardly walk in 1866, whose mind, according to Miller, was a "little muddy" in 1868, and who was finally requested to resign by his colleagues in 1869 after his memorable shift in Hepburn v. Griswold plainly indicated that he could not reason straight; Hunt, whose health failed soon after his appointment in 1872, whose work stopped completely in December 1878, who was struck speechless with paralysis in January 1879 and yet held office until February 1882; Clifford, whose mental decay had been apparent for several years, and who arrived in Washington for duty in October, 1880, unable to recognize Miller, his colleague, talking nonsense, his mind a wreck, and yet he remained a member of the court until his death in July 1881; and Field who stayed so long that his colleagues requested him to resign but who was one of the bare majority that invalidated the income tax law. "No rationalization can justify a system whereby the powers of government in a matter of such high moment are finally determined by a mind so somnolent and prepossessed as Judge Field's had become by that time."

JURY INSTRUCTION

The Judge to the Jury, Merrill E. Otis, 6 Kansas City L. Rev. 3. (D. '37; Kansas City, Mo.)

Judge Otis' address before the California State Bar is here presented with appendices containing (1) further research of the Federal Reporter, second series, as to abuse of the judge's power in commenting upon the evidence and in expressing an opinion on the credibility of the witnesses; (2) a summary of the answers of a hundred Missouri lawyers why a judge should not be permitted to sum up testimony and comment upon it; (3) a summary of the answers made by one hundred and fifty-six jurors who had served in a federal court as to whether they were conscious in their service of a lack of independence of judgment or had heard other jurors express such as opinion, and whether they preferred the federal method or the radically different Missouri method of instructing juries; (4) an analysis of the report of the House Judiciary Committee which favorably reported H. R. 4721; (5) a summary of the observations of seventy federal judges as to their methods of instructing jurors; (6) the minute adopted by the judicial conference in September, 1937, in opposition to H. R. 4721; (7) and a classification of the various States with reference to the law of jury charges. The American Bar Association should feel itself indebted to Judge Otis for his able and eloquent address and particularly for his presentation of what seems to be the best in the way of objective facts yet presented upon this highly subjective matter of policy.

LAW REVISION

The Law Revision Commission of the State of New York, John W. MacDonald, 26 The Georgetown Law Journal 60. (N. '37; Washington, D. C.)

A commission of a single state that is working successfully toward scientific law revision is of more than local interest. The New York commission established apparently in 1934 consists of five members appointed by the Governor for a five-year term. In addition, chairmen of the committees on the judiciary of the Senate and Assembly are members ex-officio. The commission has a research staff of seven or eight lawyers under the direction of an executive secretary. The job is to discover defects in the law, consider proposed changes, and to recommend reforms that are deemed advisable. No recommendation is made without research and careful consideration that is expressed in a written report. There has been no lobbying. Already fourteen legislative proposals containing from one to six bills of importance have been enacted. Six proposals have not yet been accepted by legislature but six more projects are under study. The article by Mr. MacDonald presents a concise statement of this legislation, accepted, unaccepted, and still the subject of study. It would seem that many if not

all of the other states would do well to follow this progressive example of the Empire State.

LEGAL HISTORY

The "Conspiracy Theory" of the Fourteenth Amendment, Howard J. Graham, 47 Yale L. Jour. 371. (Ja. '38; New Haven, Conn.)

There has been a theory that Representative Bingham and others on the Joint Committee of Fifteen on Reconstruction drafted the Fourteenth Amendment with the conscious purpose of affording a national protection for the property of corporations and others against State action and of obtaining its approval as an unproclaimed part of the plan to protect negroes and the loyal white citizens of the South. Mr. Graham examines this theory once again. Final conclusions are reserved, apparently, for a later article which will examine other evidence. However, a detailed examination is made of the argument of Roscoe Conkling before the Supreme Court in San Mateo County v. Southern Pacific R. R., 116 U. S. 138. Conkling used the manuscript journal of the Committee in this argument and thus conveyed the impression that the word "person" in the Fourteen Amendment was intentionally used to include corporations. It seems a fair conclusion from Mr. Graham's present article that instead of Bingham being the "villain," he was sincerly interested in the welfare of the negro although his ideas of property were such that the use of the Fourteenth Amendment to protect it from State action probably would not have been objectionable to him. Conkling, on the other hand, if not a "villain" seems to have made an unethical argument and by his immense prestige appears to have induced the Supreme Court to give an interpretation to the famous amendment that was not justified by any inference that could fairly be based upon the journal of the Committee of which Conkling was a member. Those who assert that the Fourteenth Amendment was never intended to guarantee substantive rights should be interested in explaining away what appears to be decisive proof that Bingham intended to protect just such rights and had no intention that the amendment should be limited to procedural rights.

MONOPOLIES

Monopolies and the Courts, Robert H. Jackson and Edward Dumbauld, 86 U. of Pennsylvania L. Rev. 231. (Ja. '38; Philadelphia, Pa.)

This review of the efforts of the United States to eradicate monopolies is similar to an address of Assistant Attorney-General Jackson, printed in the U. S. Law Review and summarized in December in this column. There is a general agreement that our national anti-trust laws should be revised but the objectives of governmental officials and men of business differ widely. Then the national government has never had a consistent policy as to "trust-busting." Some laws favor monopolies while others condemn them. The authors, however, lay a heavy share of the blame for the failure to prevent monopoly upon the courts. The courts have frequently interpreted laws in favor of the monopolists rather than against them. The problem before the American people is very difficult if the authors' goal is the true one. They state: "There can be no effective competition except when there are numerous competitors, approximately equal in strength and resources." Imagine what a revolution would be required in our economic life to produce that condition! No specific plan of action is proposed but policy queries are presented for answer.

PROCEDURE

The Theory and Practice of Pre-Trial Procedure, Edson R. Sunderland, 36 Michigan L. Rev. 215. (D. '37; Ann Arbor, Mich.)

This article, read before the joint session of the Judicial Section and the National Conference of Judicial Councils at the A. B. A. meeting in Kansas City, discusses a reform that has found a place in the new rules of civil procedure for the federal courts. Issue pleading at common law as well as that under the reformed codes in the various states was under the control of the attorneys and was a wasteful method of litigation. The problem is to eliminate false issues and to use valuable court time in trying only those issues that are seriously contested. But there must be a compulsory process to accomplish this. Opposing attorneys cannot be expected to do it voluntarily. The history of pretrial procedure in England during the last one hundred years is summarized. It reveals a steady expansion of the idea which is now accepted as a success. What is the history in the United States? As usual with legal reforms, we are behind the English people. The New Jersey reform of 1912 made the error of leaving the procedure to the choice of the attorneys and the reform was unsuccessful. An original effort by rule of court in the trial court in Detroit was a gratifying success, considering the handicaps. The Detroit system has been adopted in a Boston court. The new federal rules are not as advanced as the English rules but an opportunity is presented, in that pre-trial hearings "may be ordered in special cases or by general rule in the discretion of the district judge."

WILLS AND PROBATE

Power to Carry on Decedent's Business, Harry Adelman, 36 Michigan L. Rev. 185. (D. '37; Ann Arbor, Mich.)

A review of the common law power of a personal representative to carry on the business of a deceased person reveals inadequacy, uncertainty, and confusion. Yet, in order to prevent a sacrifice, "a business must be continued in most instances for at least a short period after the decendent's death." Accordingly, a number of states have passed statutes with a view to correcting these defects. The varying provisions are analysed and the problems that have arisen under them are discussed. The result is to suggest and explain a model statute and in this the conference of commissioners on uniform state law should be interested. One important provision is a grant of power to the proper court to authorize the personal representative to organize a corporation to carry on the business of the decendent. This idea is based upon a presently existing Pennsylvania statute. In this connection, a recent article in 86 U. of Pa. L. Rev. 136 on "Estate Corporations" by Edmond N. Cahn should be of interest.

AMERICAN BAR ASSOCIATION JOVRNAL

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JOSEPH R. TAYLOR
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ASSOCIATION MEMBERS ARE CHOOSING THEIR DELEGATES

During the month of March, ballots are to be sent by the Board of Elections to all members of the Association in good standing in the forty-eight States, the District of Columbia, the Territory of Hawaii, and the Territorial Group, for the mail-ballot election of a State Delegate from each of those units. The polls will close on April 22nd. Before that date, every member of the Association should exercise his right of participation in the choice of the State Delegate who will represent him in the House of Delegates.

This will be the first time that the democratic method of nominating the State Delegates by petition and electing them by mail ballot has been put in force simultaneously in all of the States. In place of the selection of these representatives by a caucus of the relatively small group of members who come to an annual meeting from a State, every member of the Association will have an opportunity to vote at home and take part in the selection of the State Delegates.

As was to be expected, contests for the office of State Delegate have developed, through the filing of petitions for rival candidates, in several of the States, including such large States as New York, Pennsylvania, Ohio, Michigan, Missouri, and Iowa. In every State, the ballot sent out by the Board of Elections will contain a blank space for personal choice.

In New York and several other States, a similar method of choosing the State Bar Association Delegates through petition nomination and mail ballot election is under consideration, in the interest of a thoroughly representative selection of the members of the House of Delegates.

Early in May, the State Delegates will meet and make their nominations of candidates for the offices of President, Secretary and Treasurer of the Association, and for Chairman of the House of Delegates. These nominations by the State Delegates will thereupon be published, in the JOURNAL and elsewhere; but nomination by the State Delegates does not foreclose the matter. Not earlier than seventy days nor later than forty days before the opening of the 1938 annual meeting in Cleveland in July, any two hundred members of the Association, of whom not more than one hundred are accredited to one State, may file a petition making other nominations for any or all of these offices. These "independent" nominations are then likewise published, for the consideration of the members and the expression of their views and preferences. Election by the House of Delegates takes place at the annual meeting. This representative method of election ensures that the outcome will not be controlled by the votes of members of a single city, State or locality.

In all of these processes of election, it goes without saying that the best interests of the profession and the public should be kept ascendant. In each instance, the man best fitted to advance the work of the Association during the ensuing year should be unhesitantly chosen.

ADMINISTRATIVE LAW AND THE JUNIOR BAR

Among the younger members of the Bar, and indeed among some of their elders, lively interest has been evinced in the subject-matter of the editorial as to "The Younger Lawyers," in the January issue of the *Journal*. In that article, it was pointed out, among other things, that the Junior Bar Conference of the American Bar Association offers to the younger lawyers an unusual opportunity for practical experience and training, as well as opportunity for public service, in the important and broadening field of administrative law. Request has been made for more specific information as to the activities and opportunities provided by the Junior Bar Conference in this respect.

The editorial indicated the nature of the experience and acquaintance which the Junior Bar Conference makes available to younger lawyers who are active in its work, but illus-

trative details are readily supplied. Members of the Conference are serving on numerous Association Committees dealing with particular aspects of administrative law; e.g., Labor, Employment and Social Security, Communications, Aeronautical Law, Commerce, Federal Taxation, Securities Laws and Regulations, etc.; also on Section Committees dealing with administrative law subjects, such as the Workmen's Compensation and Employers' liability Committee, of the Insurance Section; the Committee on Administrative Agencies and Tribunals, of the Section on Judicial Administration; the various Committees in the Mineral Law, Municipal Law, Patent, Trademark and Copyright Law, and Public Utility Law Sections.

The Junior Bar Conference does not duplicate or overlap, in its own Committees, the work of Committees, Sections, or Section Committees of the Association, but seeks to further the advocacy of Association policies. The Junior Bar Conference Legislative Drafting Committee deals with the mechanics of setting up, and stating the powers and procedures of, administrative agencies. The Conference's Public Information Program includes within its scope "Administrative Tribunals" and various topics dealing with particular phases. Informative data, bibliographies, etc., are prepared by Conference members and supplied to those who speak and write on those subjects under Conference auspices.

In all of these activities, members of the Conference come to deal with these problems along practical lines, in that they become acquainted with the point of view and experience of those who are administering these agencies in public capacities and those who are appearing before them as a matter of day-by-day practice of law. The younger men serve and work alongside of older men, and undoubtedly both gain from this relationship. For young men coming to the Bar, early activity in the Junior Bar Conference supplements admirably their law school acquaintance with administrative law, gives something which the law schools in the nature of things cannot give, and helps to develop and equip the younger lawyers for useful work in public office or the private practice of law.

"EVEN THE GODS REJOICE"

If, as has been said, "even the Gods themselves rejoice at the birth and swaddling of a new idea," certainly mere mortals may be pleased at the evidences that a relatively new idea, of unquestioned vitality has emerged and is already producing real results.

The extent to which the plan for advanced legal education has captured the imagination of the profession and stirred it to action in many communities is remarkable. The plan had a simple and tentative beginning, and was born out of the plain necessities of the situation. Recent law graduates entering the profession were plainly in need of help in mastering certain essential practical details. Hence came the institution of certain law courses specially designed to meet this need.

But it soon became evident that the need for advanced legal education went beyond the young lawyers—that new legislation, the development of new fields of practice, and increasing specialization had extended it to older members of the Bar. Efforts were thereupon made to meet it in this broader field; and although these efforts have not been wholly uniform in character, they have been uniformly successful and bear witness to the vitality of the idea which is behind them all.

In this issue Mr. Seligson tells of the plan of offering regular courses which has been followed with most satisfactory results in New York City, under the supervision of an advisory council whose membership is selected largely from the Committees on Legal Education of the Association of the Bar of the City of New York and the New York County Lawyers Association. The Section of Legal Education and Admissions to the Bar announces in this issue the formation of new legal institutes on the lines so successfully followed in Cleveland and other cities, and proposals for the formation of others which are apparently certain to be adopted and put in effect.

Whatever form the idea may take, in response to local conditions, whether Legal Institutes or more extended courses for practicing lawyers or lectures to members of the Bar, it has apparently established itself as a constructive force which is just beginning to manifest its vitality and utility.

RULES OF CIVIL PROCEDURE

The Rules of Civil Procedure have been printed as a Government document (H. Doc. 460) and may be secured from the Superintendent of Public Documents, Washington, D. C., for fifteen cents a copy. The notes to these Rules, as published in the April, 1937, Report have been revised and supplemented and are being published under the direction of the Advisory Committee. When these become available announcement of the fact will be made in the JOURNAL.

REVIEW OF RECENT SUPREME COURT DECISIONS

California Tax on Insurance Companies Invalid to Extent That Measure Includes Premiums Paid in Another State on Reinsurance Contracts Made in Another State—Effect of Judgment under Full Faith and Credit Clause—Duty of Carrier under Federal Safety Appliance Act Extends to Employee of Another Carrier under Certain Circumstances—United States District Courts Held without Jurisdiction to Enjoin Proceedings of National Labor Relations Board on Complaints of Unfair Labor Practices—South Carolina Statute Limiting Length and Width of Motor Trucks Held Valid Use of State Power to Foster Safe and Economical Use of Its Highways—Presumption of Accidental Death in Suit under Double Indemnity Clause of Insurance Policy—Procedure to Determine Valuation of Gas Company's Property for Ratemaking Purposes—Summaries of Other Cases, etc.

By Edgar Bronson Tolman*

Taxation — State Tax on Reinsurance Premiums Outside State

The California tax on insurance companies is invalid, under the Fourteenth Amendment, to the extent that its measure includes premiums on reinsurance contracts made in another state, the premiums also being paid in a state other than California.

Connecticut Gen'l Life Ins. Co. v. Johnson, 82 Adv. Op. 457; 58 Sup. Ct. Rep. 436.

This case involved a question as to the validity, under the Fourteenth Amendment, of a California tax as applied against the appellant, a Connecticut corporation, authorized to do business in California. The appellant, in addition to local business, makes reinsurance contracts with other corporations authorized to do business in California, reinsuring them against loss on policies made in California and issued to residents there.

The tax in question was laid for the years 1930 and 1931, and in suits brought in the state court to recover the taxes paid, the Supreme Court of California sustained demurrers to the complaints and ruled for the state treasurer. The cases were consolidated and a single appeal was taken to the Supreme Court, which, in an opinion by Mr. Justice Stone, reversed the ruling of the California Supreme Court. Mr. Justice Black dissented.

The California constitution, as supplemented by an Act of March 5, 1921, lays upon every insurance company doing business in the state an annual tax of 2.6% "upon the amount of the gross premiums received upon its business done in this state, less return premiums and reinsurance in companies or associations authorized to do business in this state. . ." As construed in California, the exaction is a franchise tax imposed for the privilege of doing business in the state. As interpreted by the state court, the measure of the tax includes premiums on the appellant's reinsurance policies effected and payable in Connecticut.

In passing on the questions raised by the appeal, Mr. Justice Stone first observed that a corporation which is allowed to do business in a state may claim, as an individual may claim, the protection of the Fourteenth Amendment against a subsequent application to it of state law, citing *Hanover Fire Insurance Co. v. Harding*, 272 U. S. 494.

In support of the tax, it was argued that it should be sustained because of deductions from the measure of the tax of reinsurance premiums paid to companies authorized to do business within the state. This contention, however, was rejected by the Court, which pointed out that reinsurance contracts involve no transaction, relationship, or act in California to warrant taxation by that state. In discussing this phase of the case, Mr. Justice Stone said:

"But the limits of the state's legislative jurisdiction to tax, prescribed by the Fourteenth Amendment, are to be ascertained by reference to the incidence of the tax upon its objects rather than the ultimate thrust of the economic benefits and burdens of transactions within the state. As a matter of convenience and certainty, and to secure a practically just operation of the constitutional prohibition, we look to the state power to control the objects of the tax as marking the boundaries of the power to lay it. Hence it is that a state which controls the property and activities within its boundaries of a foreign corporation admitted to do business there may tax them. But the due process clause denies to the state power to tax or regulate the corporation's property and activities elsewhere. . . . It follows that such a tax, otherwise unconstitutional, is not converted into a valid exaction merely because the corporation enjoys outside the state economic benefits from transactions within it, which the state might but does not tax, or because the state might tax the transactions which the corporation carries on outside the state if it were induced to carry them on within.

"Appellant, by its reinsurance contracts, undertook only to indemnify the insured companies against loss upon their policies written in California. The reinsurance involved no transactions or relationship between appellant and those originally insured, and called for no act in California. . . . Apart from the facts that appellant was privileged to do business in California, and that the risks reinsured were originally insured against in that state by companies also authorized to do business there, California had no relationship to appellant or to the reinsurance contracts. No act in the course of their formation, performance or discharge, took place there. The performance of those acts was not dependent upon any privilege or author-

*Assisted by James L. Homire and Leland L. Tolman.

ity granted by it, and California laws afforded to them no protection.

* *

"All that appellant did in effecting the reinsurance was done without the state and for its transaction no privilege or license by California was needful. The tax cannot be sustained either as laid on property, business done, or transactions carried on within the state, or as a tax on a privilege granted by the state."

MR. JUSTICE CARDOZO took no part in the case.*

MR. JUSTICE BLACK'S dissenting opinion was devoted largely to an exposition of his view that the term "person" in the Fourteenth Amendment does not include corporations. In this connection he urged that neither the history nor the language of the Fourteenth Amendment justifies its application for the protection of corporations, and expressed the opinion that the Court should overrule previous decisions interpreting the Fourteenth Amendment to include corporations.

Referring to the historical purposes of the Amendment, and to the delayed discovery of its application to corporations, MR. JUSTICE BLACK said:

". . . The historical purpose of the Fourteenth Amendment was clearly set forth when first considered by this Court, in the *Slaughter House Cases*, 16 Wall. 36, decided April, 1873—less than five years after the proclamation of its adoption. Mr. Justice Miller speaking for the Court said:

" 'Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities, and burdens, and curtailed their rights in the pursuit of life, liberty and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity. . . .

" 'These circumstances, whatever of falsehood or misconception may have been mingled with their presentation, forced . . . the conviction that something more was necessary in the way of Constitutional protection to the unfortunate race who have suffered so much. . . . (Congressional leaders) accordingly passed through Congress the proposition for the *fourteenth amendment, and . . . declined to treat as restored to their full participation in the government of the Union the States which had been in insurrection*, until they ratified that article by a formal vote of their *legislative bodies.*' (p. 70.)

"Certainly, when the Fourteenth Amendment was submitted for approval, the people were not told that the states of the South were to be denied their normal relationship with the Federal Government unless they ratified an amendment granting new and revolutionary rights to corporations. This Court, when the *Slaughter Houses* cases were decided in 1873, had apparently discovered no such purpose. The records of the time can be searched in vain for evidence that this Amendment was adopted for the benefit of corporations. It is true that in 1882, twelve years after its adoption, and ten years after the *Slaughter Houses* cases, *supra*, an argument was made in this Court that a Journal of the joint Congressional Committee which framed the Amendment, secret and undisclosed up to that date, indicated the Committee's desire to protect corporations by the use of the word 'person.' Four years later, in 1886, this Court in the case of *Santa Clara County* v. *Southern Pacific Railroad*, 118 U. S. 394, decided for the first time that the word 'person in the Amendment did in some instances include corporations. A secret purpose on the part of the members of the Committee, even if such be the fact, however, would not be sufficient to justify any such construction. The history of the Amendment proves that the people were told that its purpose was to protect weak and helpless human beings and were not told that it was intended to remove corporations in any fashion from the control of state governments. The Fourteenth Amendment followed the freedom of a race from slavery. Justice Swayne said in the *Slaughter Houses Cases, supra*, that 'by "any person" was meant *all* persons within the jurisdiction of the State. No distinction is intimated on account of race or color.' Corporations have neither race nor color. He knew the Amendment was intended to protect the life, liberty and property of *human* beings."

A discussion then followed of the language of the Amendment in which it was argued that its very terms negative the theory that it was intended to include the protection of corporations. The dissent was concluded with the following comment:

"This Amendment sought to prevent discrimination by the states against classes or races. We are aware of this from words spoken in this Court within five years after its adoption, when the people and the courts were personally familiar with the historical background of the Amendment. 'We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.' Yet, of the cases in this Court in which the Fourteenth Amendment was applied during the first fifty years after its adoption, less than one-half of one percent invoked it in protection of the negro race, and more than fifty per cent asked that its benefits be extended to corporations.

"If the people of this nation wish to deprive the States of their sovereign rights to determine what is a fair and just tax upon corporations doing a purely local business within their own State boundaries, there is a way provided by the Constitution to accomplish this purpose. That way does not lie along the course of judicial amendment to that fundamental charter. An Amendment having that purpose could be submitted by Congress as provided by the Constitution. I do not believe that the Fourteenth Amendment had that purpose, nor that the people believed it had that purpose, nor that it should be construed as having that purpose.

"I believe the judgment of the Supreme Court of California should be sustained."

The case was argued by Mr. William Marshall Bullitt and Mr. B. M. Anderson for the appellant, and by Mr. Neil Cunningham for the appellee.

Practice—Effect of Judgment Under Full Faith and Credit Clause

Under the full faith and credit clause a judgment obtained by a defendant on a cross-action against the plaintiff, where service is made on the plaintiff's attorney rather than by personal service on the plaintiff, if valid under the law of the state in which such judgment was obtained, is entitled to the same effect in another state, even though under the laws of the latter state personal service on the cross-defendant is required for a valid judgment.

Adam v. *Saenger et al.* 82 Adv. Op. 409; 58 Sup. Ct. Rep. 454.

In this opinion, by MR. JUSTICE STONE, the Supreme Court considered the validity of and the effect to be given in Texas to a judgment of the Supreme Court of California. The petitioner, assignee of a California judgment against Beaumont Export & Import Company, a Texas corporation, brought the suit under review in a Texas court. The suit in Texas was based upon a judgment which had previously been obtained in California. The Texas courts sustained a demurrer to the complaint and dismissed the suit. On certiorari, the judgment was reversed by the Supreme Court.

The judgment sued upon in Texas was one which had been obtained in California in a cross-action which had been commenced in a suit pending in California

*Mr. Justice Cardozo took no part in the decision of any of the cases reviewed in this issue.

by the defendant (as cross-plaintiff) in the action in that State against the plaintiff (as cross-defendant). The principal question raised on the demurrer to the complaint was whether the service of a cross-complaint upon the plaintiff's attorney in California was sufficient to sustain the judgment founded upon it. The Texas courts expressed the view that the rule in Texas is that a cross-action occupies the status of an independent suit and requires personal service upon the cross-defendant and that, consequently, in the absence of a waiver of such service, or an appearance by the cross-defendant, personal service on the latter must be had in order to confer jurisdiction upon the Court to determine the matter and render judgment. It consequently held that the California judgment could not be enforced in Texas.

The Supreme Court in reviewing the case observed that under the full faith and credit clause, Art. IV, Sec. 1, of the Constitution, and under R.S. 905, U.S.C. 687, enacted pursuant thereto, the duly attested record of the judgment of a state is entitled to such faith and credit in every court within the United States as it has by the law and usage in the state from which it is taken. It observed further that the effect of the California proceeding is not controlled by the decision of the Texas courts, but is open for review by the Supreme Court itself.

Upon this background, the Supreme Court then proceeded to an examination of the effect of the proceedings had in California and concluded that in California they were sufficient to sustain a valid judgment in favor of the petitioner and, accordingly, that like effect must be given the judgment in Texas, under the full faith and credit clause. The reasoning of the Court leading to this conclusion was stated as follows by MR. JUSTICE STONE:

"Section 442 of the California Code of Civil Procedure specifically provides that a defendant may secure affirmative relief upon 'cross-complaint' which 'must be served upon the parties affected thereby,' and requires service of 'summons upon the cross-complaint' only upon such parties as 'have not appeared in the action.' Arguing that action means only 'cross-action' and not the original action brought by the plaintiff, the Texas court concluded that a plaintiff who has not appeared in the cross-action must be served with summons 'as upon the commencement of an original action.' But the word 'action,' even if susceptible of such meaning, cannot be so interpreted in the face of the pleaded California decisions which hold that a cross-complaint may be served on the attorney of one who is already a party to the original action. . . .

"Section 1015 provides that in all cases where a party, whether resident or non-resident, has an attorney in an action, 'the service of papers, when required, must be upon the attorney instead of the party, except service of subpoenas, of writs and other process issued in the suit, and of papers to bring him into contempt.' The Court of Civil Appeals construed this section as requiring 'service of subpoenas, of writs, and other process issued in the suit' upon the party rather than the attorney, and as including the cross-complaint in the terms 'writ' and 'process.' But assuming that a cross-complaint served without summons may be so characterized, it is clear that the section does not by its terms preclude valid service of the cross-complaint upon the attorney for a party which, as we have seen, §442 permits. Section 1015 directs service upon the attorney of all but three types of papers excepted, but says nothing as to the effectiveness of service of those papers upon him. Section 1011, set out in the pleading though not referred to in the court's opinion, reads, 'Notices and papers, when and how served. The Service may be personal, by delivery to the party or attorney on whom the service is required to be made. . . .'

"The question whether §1015 does forbid service of a cross-complaint on the attorney has been definitely answered in the negative by the Supreme Court of California, which, in *Farrar v. Steenburgh* [193 Cal. 94, 97] held, 'Service of a cross-complaint upon a plaintiff who appears by an attorney is not made by a summons to the plaintiff, but by delivery of a copy of the cross-complaint to the attorney.' Upon this ground the California District Court of Appeals, in cases on which petitioner relies, has sustained judgments taken upon default in a cross-action begun by service of the cross-complaint on the plaintiff's attorney. . . . Upon all the pleaded evidence of the California law, to the consideration of which we are restricted by the present state of the record, we think the only inference to be drawn is that the service in the California suit was authorized by California law."

In concluding his opinion, MR. JUSTICE STONE called attention to the fact there is nothing in the Fourteenth Amendment to prevent a state from adopting procedure whereby a judgment *in personam* may be rendered in a cross-action against a plaintiff by service of process or pleading on his attorney of record. In elaboration of this he said:

"There is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment *in personam* may be rendered in a cross-action against a plaintiff in its courts, upon service of process or of appropriate pleading upon his attorney of record. The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court, there is nothing arbitrary or unreasonable in treating him as being there for all purposes for which justice to the defendant requires his presence. It is the price which the state may exact as the condition of opening its courts to the plaintiff."

MR. JUSTICE BLACK concurred in the result.

The case was argued by Mr. M. G. Adams for the petitioner, and by Mr. Oliver J. Todd for the respondent.

Federal Safety Appliance Act—Scope of Duty Prescribed by Act

Under the Federal Safety Appliance Act, the duty of a carrier subject thereto extends to an employee of another carrier whose employment requires him to inspect a car in the use of the other carrier before the same is accepted by the employing carrier. Consequently, an employee of a trunk line carrier, employed to inspect cars while in the use of a terminal railroad prior to their acceptance by the trunk line carrier, may recover under the Federal Safety Appliance Act for personal injury sustained by him as a result of a defect proscribed by that Act, which occurred during the inspection of a car still in the use of the terminal railroad.

Brady v. Terminal Railroad Association of St. Louis, 82 Adv. Op. 431; 58 Sup. Ct. Rep. 424.

In this case the Court considered the scope of the duty imposed by the Federal Safety Appliance Act. The petitioner was an employee of the Wabash Railway Company, engaged as a car inspector at Granite City, Illinois. He was there injured while inspecting a car brought by the respondent, Terminal Railroad, from St. Louis to Granite City.

At the latter point the car was placed upon a track of the Wabash known as a "receiving" or "inbound" track. The purpose of the inspection was to determine whether the car would be accepted by the Wabash, and both it and the respondent were carriers engaged in interstate commerce. In the course of making his inspection, petitioner stood upon one of the side ladders of the car and, in attempting to pull himself to the

top of the car, took hold of a grabiron which came loose, together with the supporting board, causing the petitioner to fall and to sustain personal injury. It was found that the board supporting the grabiron had become rotten from end to end on the inside and, to some extent, on the upper side around the bolts holding the grabiron to the board.

The petitioner first sued his employer, the Wabash, to recover under the provisions of the Safety Appliance Act. The Supreme Court of Missouri denied recovery on the ground that the car had not been accepted by the Wabash at the time the accident occurred. While that suit was pending, the petitioner sued the Terminal Railroad, in the Missouri courts. The state courts ruled for the defendant. On certiorari, this was reversed by the Supreme Court in an opinion by MR. CHIEF JUSTICE HUGHES.

The first question considered was whether the car was in use by the respondent at the time of the injury. This question was resolved against the Terminal Railroad.

The next question considered was whether the responsibility of the Terminal Railroad had ended. In connection with this question, it was pointed out that the Wabash had not accepted the car and that, since it had not been withdrawn from use and was still in possession of the Terminal Railroad, that company was still under a statutory duty with respect to it. This conclusion then led to the issue whether, under the statute, the Terminal Railroad owed a duty to the petitioner at the time in question. Pointing out that under the statute the carrier's duty is not limited to employees, that the petitioner's work required him to use the grabiron, and further that the statutory liability is not predicated upon the railroad's negligence, the Court reversed the decision of the Supreme Court of Missouri, saying:

"As the car had not been withdrawn from use and was still in the possession of the Terminal Association, its statutory obligation continued and the question is whether that duty was owing to petitioner. The fact that petitioner was not an employee of the Terminal Association did not necessarily absolve it from duty to him. We have said that 'the nature of the duty imposed by the statute and the benefits resulting from its performance' usually determine what persons are entitled to invoke its protection. It was in this view that we held that the power brakes required by the Safety Appliance Act were not only for the safety of railway employees and passengers on trains but also of travelers on the highways at railway crossings. . . . In the instant case, petitioner in the course of his duty would have occasion to go upon the car and use the grabiron, and accordingly the benefit of the statute would exend to him, although he was not employed by the carrier holding the car in use, unless he was outside the scope of the statute because of the special character of his work. His work was that of inspection to discover defects of the sort here found to exist as well as others.

"This final question must be determined in the light of the nature of the obligation resting upon the carrier in relation to the use of a defective car. The statutory liability is not based upon the carrier's negligence. The duty imposed is an absolute one and the carrier is not excused by any showing of care however assiduous. . . . The breadth of the statutory requirements is shown by the fact that it embraces all locomotives, cars and similar vehicles used on any railway that is a highway of interstate commerce and is not confined exclusively to vehicles engaged in such commerce. . . . Laying down this comprehensive rule as a matter of public policy, Congress has made no exception of those employed in inspecting cars. The statute has been liberally construed 'so as to give a right of recovery for every injury the proximate cause of which was a failure to comply with a requirement of the Act.' . . .

"We think that these considerations require the conclusion that one is not to be denied the benefit of the Act because his work was that of inspection for the purpose of discovering defects. As we said in *Louisville & Nashville R. Co.* v. *Layton*, [243 U. S. 617], the liability 'springs from its being made unlawful to use cars not equipped as required,—not from the position the employee may be in or the work which he may be doing at the moment when he is injured,' provided the defective equipment is the proximate cause of the injury.

"The fact that petitioner was looking for defects of the sort which caused his injury does not prevent recovery as the statute expressly excludes the defense of assumption of risk. 45 U. S. C. 7, 54.

"The judgment is reversed and the cause is remanded for further proceedings not inconsistent with this opinion."

The case was argued by Mr. Mark D. Eagleton for the petitioner, and by Mr. Walter N. Davis for the respondent.

National Labor Relations Act—Jurisdiction of District Courts to Enjoin Proceedings of National Labor Relations Board

Under the National Labor Relations Act, the United States District Courts have no jurisdiction to enjoin proceedings of the National Labor Relations Board on complaints of unfair labor practices, even though the party seeking injunctive relief alleges that interstate commerce is not involved in the transactions under investigation. Congress has vested jurisdiction in respect of the subject matter in the National Labor Relations Board and judicial review of its actions is vested in the Circuit Courts of Appeals.

Myers et al. v. Bethlehem Shipbuilding Corp., Ltd., 82 Adv. Op. 399; 58 Sup. Ct. Rep. 459.

Newport News Shipbuilding and Dry Dock Co. v. Schauffler, 82 Adv. Op. 406; 58 Sup. Ct. Rep. 466.

In two separate opinions in the above cases, delivered by MR. JUSTICE BRANDEIS, the Supreme Court considered the jurisdiction of the federal District Courts to enjoin the conduct of proceedings by the National Labor Relations Board. That Board, in the *Myers* case, on a charge filed with it by the Industrial Union of Marine and Shipbuilding Workers of America, Local No. 5, of unfair labor practices by the Bethlehem Shipbuilding Corporation, Ltd., filed a complaint against the shipbuilding company. The complaint specifically alleged that the respondent company was engaged in interstate commerce and that it dominated and interfered with a labor organization in its plant. The Board notified the corporation that a hearing would be held on a certain day in Boston in accordance with the regulations of the Board, and that the corporation would have the right to appear in person or otherwise and give testimony.

On the day fixed for the hearing, the corporation filed a bill in equity in a Federal District Court in Massachusetts seeking to enjoin the holding of a hearing on the complaint in question. Another bill in equity involving similar facts and contentions was filed by certain employees of the corporation and officers of the labor organization said to be dominated by the company.

The District Court issued a restraining order and, later, a preliminary injunction. Its decrees were affirmed by the circuit court. On certiorari, the Supreme Court ruled that the District Court was without power to enjoin the Board from holding hearings. MR. JUSTICE BRANDEIS, in delivering the opinion of the

Court, first pointed out that there was no claim that the statutory provisions or rules of procedure are illegal, or that the corporation was not given ample opportunity to answer the complaint or to contest the charges; but that the claim was that the provisions of the law are not applicable to the corporation's business at the plant in question because the operations there are not carried on and the products manufactured there are not sold in interstate or foreign commerce. It was argued that the corporation's relations with its employees did not burden or interfere with interstate or foreign commerce; that hearings would be futile; and that such hearings would result in irreparable damage to the employer, not only by reason of direct cost and loss of time, but also because of impairment of the good will and harmonious relations existing between the employer and its workmen.

These contentions were rejected, upon the ground that the power to deal with the matter has been vested in the Board and in the District Courts of Appeals. As to this, MR. JUSTICE BRANDEIS said:

"The District Court is without jurisdiction to enjoin hearings because the power 'to prevent any person from engaging in any unfair practice affecting commerce,' has been vested by Congress in the Board and the Circuit Court of Appeals, and Congress has declared: 'This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.' The grant of that exclusive power is constitutional, because the Act provided for appropriate procedure before the Board and in the review by the Circuit Court of Appeals an adequate opportunity to secure judicial protection against possible illegal action on the part of the Board. No power to enforce an order is conferred upon the Board. To secure enforcement, the Board must apply to a Circuit Court of Appeals for its affirmance. And until the Board's order has been affirmed by the appropriate Circuit Court of Appeals, no penalty accrues for disobeying it. The independent right to apply to a Circuit Court of Appeals to have an order set aside is conferred upon any party aggrieved by the proceeding before the Board. The Board is even without power to enforce obedience to its subpoena to testify or to produce written evidence. To enforce obedience it must apply to a District Court; and to such an application appropriate defence may be made."

Reference was then made to the language of the Court in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, sustaining the procedural provisions of the law. The opinion then emphasized that in cases where interstate commerce is not involved, defence on that ground should be made before the Board, and in case of its erroneous ruling resort should be had to the Circuit Court of Appeals. In developing this point, MR. JUSTICE BRANDEIS said:

"It is true that the Board has jurisdiction only if the complaint concerns interstate or foreign commerce. Unless the Board finds that it does, the complaint must be dismissed. And if it finds that interstate or foreign commerce is involved, but the Circuit Court of Appeals concludes that such finding was without adequate evidence to support it, or otherwise contrary to law, the Board's petition to enforce it will be dimissed, or the employer's petition to have it set aside will be granted. Since the procedure before the Board is appropriate and the judicial review so provided is adequate, Congress had power to vest exclusive jurisdiction in the Board and the Circuit Court of Appeals."

Attention was given also the employer's contention that in view of its denial that interstate or foreign commerce was involved, it is subjected to irreparable injury in violation of its constitutional rights, unless the District Court has power to issue an injunction against the holding of a hearing by the Board. In rejecting this contention, the Court pointed out that, if sound, it would result in the substitution of the District Court for the Board as the tribunal to hear the case in the first instance, contrary to the intent of Congress. The contention was also characterized as contrary to the rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.

The case was argued by Mr. Robert B. Watts for the petitioner, and by Mr. Claude R. Branch for the respondent.

In the *Newport News Shipbuilding and Dry Dock Company* case, charges of unfair labor practices were also involved and the Board filed a complaint against the employer giving notice of a hearing pursuant to the Act. The employer did not answer the complaint, but sued in a federal court in Virginia to enjoin the holding of a hearing. There the District Court and the Circuit Court of Appeals both denied the injunctive relief sought, being of the view that the statute provided an adequate remedy and equitable relief would not lie until the administrative remedy under the statute had been exhausted. On certiorari, the decree of the court below was affirmed in an opinion by MR. JUSTICE BRANDEIS for the reasons stated in *Bethlehem Shipbuilding Corp., Ltd., v. Myers.*

In addition, there was a brief discussion of three subordinate points.

This case was argued by Mr. H. H. Rumble & Mr. Fred H. Skinner for the petitioner, and by Mr. Robert B. Watts for the respondent.

State Statutes—Regulation of State Highways—Limitations on Weight and Width of Trucks

The South Carolina statute, imposing limitations of weight and width on motor trucks and semi-trailer trucks, which are non-discriminatory as between interstate and intrastate commerce, does not impose an undue burden on interstate commerce, and is a valid exercise of the State's power to foster safe and economical use of its highways.

South Carolina State Highway Dept. v. Barnwell Bros., Inc., 82 Adv. Op., 469; 58 Sup. Ct. Rep. 510.

In this case the Supreme Court considered the validity of an Act of South Carolina prohibiting the use, on state highways, of motor trucks and "semi-trailer trucks" whose width exceeds 90 inches, and whose weight (including load) exceeds 20,000 pounds. For purposes of the weight limitation the semi-motor truck is considered as a single unit. The principal question involved was whether the prohibition imposed an unconstitutional burden on interstate commerce.

The appellees included the original plaintiffs, who were truckers and interstate shippers; the Interstate Commerce Commission; and others who were allowed to intervene as plaintiffs. The suit was brought in a specially constituted federal District Court of three judges, against officials of the State to enjoin enforcement of the Act, on the ground that sections 4 and 6 relating to weight and width have been superseded by the Federal Motor Carrier's Act of 1935; that they violate the due process clause of the Fourteenth Amendment; and are an unreasonable burden on inter-

state commerce. Certain railroads were allowed to become parties defendant.

The District Court made comprehensive findings, and ruled that the state Act had not been superseded by the federal Act, and also that the challenged provisions did not violate the Fourteenth Amendment; but it held that the weight and width regulations placed an undue burden on interstate motor traffic passing over certain specified state highways, and enjoined the enforcement of the weight provision against interstate motor carriers on specified state highways and also the width limitation of 90 inches, except in cases of vehicles exceeding 96 inches in width.

On appeal the Supreme Court reversed the decree in an opinion by MR. JUSTICE STONE. In discussing the questions involved the Supreme Court first observed that while the findings of the District Court were not assailed, nevertheless it had reached its conclusion after weighing conflicting evidence. This evidence was reviewed in the opinion in some detail. It was noted also that the trial court, in reaching its conclusions, assumed that the commerce clause imposes on state regulations of this character a standard of reasonableness more exacting when applied to interstate commerce than that required by the Fourteenth Amendment as to all traffic, and that a standard of weight and width appropriate to state regulations when applied to intrastate traffic may be prohibited because of its effect on interstate commerce, although the conditions relating to both classes of traffic are the same as respects safety and protection of the highways.

It was also pointed out that Congress has not undertaken to prescribe the weight and size of motor vehicles operating in interstate commerce, but has left to the states such power as they retained in the Constitution.

MR. JUSTICE STONE then discussed prior rulings of the Court which leave to the states, notwithstanding the commerce clause, power to regulate local matters even though the regulations affect interstate commerce in some measure, and said:

"While the constitutional grant to Congress of power to regulate interstate commerce has been held to operate of its own force to curtail state power in some measure, it did not forestall all state action affecting interstate commerce. Ever since *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245, and *Cooley* v. *Board of Port Wardens*, 12 How. 299, it has been recognized that there are matters of local concern, the regulation of which unavoidably involves some regulation of interstate commerce but which, because of their local character and their number and diversity, may never be fully dealt with by Congress. Notwithstanding the commerce clause, such regulation in the absence of Congressional action has for the most part been left to the states by the decisions of this Court, subject to the other applicable constitutional restraints.

"The commerce clause, by its own force, prohibits discrimination against interstate commerce, whatever its form or method, and the decisions of this Court have recognized that there is scope for its like operation when state legislation nominally of local concern is in point of fact aimed at interstate commerce, or by its necessary operation is a means of gaining a local benefit by throwing the attendant burdens on those without the state. . . It was to end these practices that the commerce clause was adopted. . . The commerce clause has also been thought to set its own limitation upon state control of interstate rail carriers so as to preclude the subordination of the efficiency and convenience of interstate traffic to local service requirements."

The Court then stated that the present case did not present a situation in which the existence of federal regulatory power over interstate commerce forces conformity to standards which Congress *might* adopt, but *has not*, and said:

"But the present case affords no occasion for saying that the bare possession of power by Congress to regulate the interstate traffic forces the states to conform to standards which Congress might, but has not adopted, or curtails their power to take measures to insure the safety and conservation of their highways which may be applied to like traffic moving intrastate. Few subjects of state regulation are so peculiarly of local concern as is the use of state highways. There are few, local regulation of which is so inseparable from a substantial effect on interstate commerce. Unlike the railroads, local highways are built, owned and maintained by the state or its municipal subdivisions. The state has a primary and immediate concern in their safe and economical administration. The present regulations, or any others of like purpose, if they are to accomplish their end, must be applied alike to interstate and intrastate traffic both moving in large volume over the highways. The fact that they affect alike shippers in interstate and intrastate commerce in large number within as well as without the state is a safeguard against their abuse."

After reference to rulings sustaining the power of the states to impose regulations which do not discriminate against interstate commerce, MR. JUSTICE STONE stated that, in the absence of federal action on the subject, the judicial function under the commerce clause as well as under the Fourteenth Amendment stops with the inquiry whether the state in adopting the regulations in question has chosen means that are reasonably adapted to the end sought. On both of these questions the Court sustained the action of the state legislature and stated its reasons therefor, as follows:

"Here the first inquiry has already been resolved by our decisions that a state may impose non-discriminatory restrictions with respect to the character of motor vehicles moving in interstate commerce as a safety measure and as a means of securing the economical use of its highways. In resolving the second, courts do not sit as legislatures, either state or national. They cannot act as Congress does when, after weighing all the conflicting interests, state and national, it determines when and how much the state regulatory power shall yield to the larger interests of a national commerce. And in reviewing a state highway regulation where Congress has not acted, a court is not called upon, as are state legislatures, to determine what, in its judgment, is the most suitable restriction to be applied of those that are possible, or to choose that one which in its opinion is best adapted to all the diverse interests affected. . . When the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for the legislative body, on which rests the duty and responsibility of decision. . . This is equally the case when the legislative power is one which may legitimately place an incidental burden on interstate commerce. It is not any the less a legislative power committed to the states because it affects interstate commerce, and courts are not any the more entitled, because interstate commerce is affected, to substitute their own for the legislative judgment. . .

"Since the adoption of one weight or width regulation, rather than another, is a legislative not a judicial choice, its constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard. . . Being a legislative judgment it is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility. Hence, in reviewing the present determination we examine the record, not to see whether the findings of the court below are supported by

evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis. . . Not only does the record fail to exclude that possibility, but it shows affirmatively that there is adequate support for the legislative judgment."

A review of the evidence as to the weight regulation then followed leading to the conclusion that the action of the State was amply sustained by the evidence. The regulation as to width was also sustained with a brief comment touching the width of highways in the state and other factors relating to safety and economy.

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the case.

The case was argued by Messrs. Steve C. Griffith and Thomas W. Davis for the appellants, and by Messrs. S. King Funkhouser and Frank Coleman for the appellees.

Insurance—Double Indemnity—Presumption of Accidental Death

In a suit in a federal court to recover damages under a double indemnity clause of a life insurance policy, where double indemnity is payable if the insured's death was accidental, but not if death was the result of suicide, the presumption of accidental death ceases when evidence has been introduced sufficient to sustain a finding that death was not accidental, and in such circumstances the insurer is not under a burden to prove suicide by a preponderance of evidence.

New York Life Ins. Co. v. Gamer, 82 Adv. Op. 480; 58 Sup. Ct. Rep. 500.

This case arose on a suit to recover double indemnity on a life insurance policy issued by the petitioner. The insured died by gunshot and the respondent as executrix, brought suit in a state court in Montana to recover $20,000 damages under a double indemnity clause contained in the policy. The pertinent parts of that clause read as follows:

"The Double Indemnity . . . shall be payable upon receipt of due proof that the death of the Insured resulted directly and independently of all other causes from bodily injury effected solely through external, violent and accidental means. . . Double Indemnity shall not be payable if the Insured's death resulted from self-destruction, whether sane or insane."

The insurance company removed the case to a federal court on the ground of devirsity of citizenship, and conceded the plaintiff was entitled to the face amount of the policy. This amount was deposited in court, with interest. The insurer denied that death was through accidental means, and, as an affirmative defense, alleged that the death of the insured resulted from suicide.

The case was tried twice and at the first trial a verdict was directed for the defendant. On appeal this was reversed, the Circuit Court of Appeals taking the view that the question of accidental death was for the jury. At the second trial the defendant again requested a directed verdict at the close of the evidence, asserting that the proof failed to establish accidental death and showed that it was by suicide. But the court denied the motion and submitted the case to the jury. The charge to the jury contained the following:

"The question remains as to whether the death was accidentally caused, or the means of the death was accidental or whether it was suicide. But when the defendant took the position that it takes here it assumed the burden of proving to you by a preponderance of evidence that Walter Gamer killed himself voluntarily. . .

"The presumption of law is that the death was not voluntary and the defendant in order to sustain the issue of suicide . . . must overcome this presumption and satisfy the jury, by a preponderance of the evidence, that his death was voluntary. . ."

The jury found a verdict for the plaintiff for the $20,000, with interest, and a judgment for that sum was affirmed by the Circuit Court of Appeals. On certiorari, the judgment was reversed by the Supreme Court in an opinion by Mr. Justice Butler. He first considered the question whether the defendant was entitled to a directed verdict and concluded that such direction was not warranted on the evidence.

The Court also passed upon the correctness of the instructions quoted above. In dealing with this question examination was made of the ruling in the *Travelers Ins. Co. v. McConkey,* 127 U. S. 661. In that case the Court had said:

"'Did the court err in saying to the jury that upon the issue as to suicide the law was for the plaintiff unless that presumption was overcome by competent evidence? This question must be answered in the negative. The condition that direct and positive proof must be made of death having been caused by external, violent and accidental means did not deprive the plaintiffs, when making such proof, of the benefit of the rules of law established for the guidance of courts and juries in the investigation and determination of facts'."

The Court then expressed the view that the opinion from which the foregoing statement was quoted contained no suggestion that the Court deemed the issue as to burden of proof arising on a general denial to be affected by the defendant's allegation of suicide; and that it was consistent with the ruling that the presumption of accidental death is not evidence and ceases upon the introduction of substantial proof to the contrary. Accordingly the Court found that the opinion in the *McConkey case* did not sustain the instructions challenged here.

MR. JUSTICE BUTLER then proceeded to an analysis of the instant case and to the following statement of the applicable rule:

"Under the contract in the case now before us, double indemnity is payable only on proof of death by accident as there defined. The burden was on plaintiff to allege and by a preponderance of the evidence to prove that fact. The complaint alleged accident and negatived self-destruction. The answer denied accident and alleged suicide. Plaintiff's negation of self-destruction taken with defendant's allegation of suicide served to narrow the possible field of controversy. Only the issue of accidental death *vel non* remained. The question of fact to be tried was precisely the same as if plaintiff merely alleged accidental death and defendant interposed denial without more. . .

"Upon the fact of violent death without more, the presumption, i. e., the applicable rule of law, required the inference of death by accident rather than by suicide. As the case stood on the pleadings, the law required judgment for plaintiff. *Travelers' Ins. Co. v. McConkey, supra,* 665. It was not submitted on pleadings but on pleadings and proof. In his charge the judge had to apply the law to the case as it then was. The evidence being sufficient to sustain a finding that the death was not due to accident, there was no foundation of fact for the application of the presumption; and the case stood for decision by the jury upon the evidence unaffected by the rule that from the fact of violent death, there being nothing to show the contrary, accidental death will be presumed. The presumption is not evidence and may not be given weight as evidence. . .

"In determining whether by the greater weight of evidence it has been established that the death of the insured was accidental, the jury is required to consider all admitted and proved facts and circumstances upon which the determination of that issue depends and, in reaching its decision,

should take into account the probabilities found from the evidence to attend the claims of the respective parties.

"The challenged instructions cannot be sustained."

MR. JUSTICE CARDOZO and MR. JUSTICE REED took no part in the case.

MR. JUSTICE BLACK delivered a dissenting opinion in which the view was expressed that the controversy should be determined under the laws of Montana, and that under the laws of that State the challenged instructions were proper. The dissenting opinion also urged that the effect of the decision of the majority of the Court was to give the judge the right to decide when sufficient evidence has been introduced; and take from the jury the right to find accidental death by violent and external means, thereby transferring jury functions from jury to judge. This was thought to diminish the right of trial by jury guaranteed by the Seventh Amendment.

The case was argued by Mr. J. A. Poore for the petitioner, and by Mr. William Meyer for the respondent.

Public Utilities—Valuation of Gas Company's Property for Rate-Making Purposes—Procedure to Determine

The function of judicial review of a rate order of a state railroad commission may, consistently with the requirements of the due process clause of the Fourteenth Amendment, be vested in a state court for trial by a jury.

The due process clause does not require that the state procedure in such a case shall provide that special issues shall be framed and submitted to the jury, or that particular component parts of the public utility's property shall be singled out and specially passed on by the jury.

United Gas Public Service Co., v. Texas et al., 82 Adv. Op. 490; 58 Sup. Ct. Rep. 483.

In this opinion the Court passed upon an appeal from a Court of Civil Appeals of Texas. That court had affirmed a rate order of the Railroad Commission of Texas fixing the rates to be charged for natural gas supplied by the appellant for domestic use in the City of Laredo.

The City of Laredo in December, 1931, by ordinance, reduced the gas rates from 75c to 40c per 1000 cubic feet. The Texas Border Gas Company, which was supplying natural gas in Laredo, filed an appeal with the Railroad Commission and lodged a supersedeas bond as required by the applicable state statutes. The condition of this bond was that the company should refund to the City, for the benefit of the consumers, any excess of rates over those finally determined to be fair and reasonable rates on the value of the property used and useful in supplying gas.

Before the hearing by the Commission the South Texas Gas Company, which owned and operated the transmission properties and transported the gas sold to the Texas Border Company, was made a party to the proceeding. The Texas Border Gas Company applied to the City for an increase in rates, and on the latter's failure to act, took an appeal to the Commission. The appeals were consolidated and the United Gas Public Service Company, a Delaware Corporation, entered its appearance on both appeals, alleging its acquisition of properties of both companies. Thereafter the Commission, in June, 1933, fixed the rate at 55c per m.c.f., and made the order retroactive to January 1, 1932.

The appellant then brought suit in the United States District Court to restrain the enforcement of the rate order. Thereafter the State of Texas, members of the Commission, and the City brought suit in the District Court of Travis County in the nature of an appeal under applicable Texas statutes, for the purpose of protecting the jurisdiction of the state court and of enforcing the Commission's order if found to be valid. That court then stayed all proceedings by the Commission or state and city officials to enforce the order until determination of the suit. The federal District Court of three judges also stayed proceedings pending the determination of the suit in the state court. Meanwhile, the 75c rate has been charged by the company.

The state court in April, 1934, sustained the Commission's order, except the provision thereof making the rate retroactive. On appeal to the Court of Civil Appeals the order was affirmed including the retroactive feature. The State Supreme Court refused a writ of error.

On appeal to the Supreme Court a hearing was had and later a reargument. The result of the appeal was an affirmance of the judgment, in an opinion by Mr. Chief Justice Hughes. In his opinion he outlined the proceedings before the Commission, pointing out that it had received and examined the evidence offered and had heard arguments of counsel for the parties. Thereafter it had found the present fair value of the property to be $885,000. The Court also reviewed the proceedings in the District Court of Travis County pointing out that the trial there was a trial *de novo*. In that court the trial was before a jury, a motion by the appellant to discharge the jury having been denied. The entire record before the Commission was placed in evidence as well as additional testimony concerning the property valuation, depreciation reserve accrual, revenues, expenses, rates of return, etc.

At the close of the evidence the appellant moved for a peremptory instruction in its favor and suspension of the Commission's order for the years 1932 and 1933. These motions were overruled. The appellant then moved for a submission of the case to the jury on "special issues" and not upon a "special charge." The court then denied the appellant's motion to require the jury to pass on special issues separately stated; that is, to require the jury to make separate findings as to valuation of component parts of the property and as to various other items.

The trial court submitted the case to the jury on a single special issue stated as follows:

"Do you find that the order of the Railroad Commission of Texas bearing date June 13, 1933, providing for a fifty-five cent gas rate to residential consumers within the city of Laredo, Texas, under the facts introduced in evidence before you, is unreasonable and unjust as to defendant, United Gas Public Service Company. Answer this question 'yes' or 'no.'"

In thus submitting the case various terms were defined for the jury by instructing them to such matters as fair return, fair value, operating expenses, annual depreciation and reproduction cost new.

The jury found the special issue against the appellant, and the latter moved for judgment notwithstanding the verdict. Its motion was denied, judgment entered, and an appeal was then taken to the Court of Civil Appeals.

That court reached the conclusion that the appellant had not only failed to establish its claim for reversal, but that in the light of a presumption in favor of the validity of the Commission's order and of the quantum and character of proof necessary to rebut the presumption the evidence was insufficient as a

matter of law to show that the 55c rate order was unjust, unreasonable or confiscatory. It added that consequently all questions of practice "go out of the case." Its conclusion was, further, that the trial court was in error in its ruling that the retroactive provision of the order was invalid.

In passing on the questions involved MR. CHIEF JUSTICE HUGHES separated them into two principal issues: (1) procedural due process; and, (2) the question of confiscation.

As to the first question the Court found no ground for holding that the appellant did not have a fair hearing, since its evidence was received and weighed and its arguments heard and considered.

Consideration was then given to the somewhat unusual feature of the proceeding which permitted a jury to pass upon the validity of the Commission's rate order, the appellant having challenged the propriety of a trial by jury under the circumstances, and the manner of submitting the issues to the jury.

As to the propriety of a jury trial of the issues, the Supreme Court found no constitutional impediment to such proceeding. Dealing with this question, and pointing out that historically juries have been called upon to pass upon many intricate and complicated questions, MR. JUSTICE HUGHES said:

"We do not fail to appreciate the difficulty in presenting to a jury the complicated issues in a rate case, especially where, as here, the evidence is voluminous, embracing the conflicting valuations of experts and a host of details in appraisals and in accounts of operations, with elaborate tabulations. Even in trials of such cases without a jury the service of a special master for the analysis of the details in evidence with respect to values and return has been found advisable. We have had abundant occasion to become familiar with the difficulty of such determinations. But we are not dealing with questions of policy as to procedure. The State is entitled to determine the procedure of its courts, so long as it provides the requisite due process. And on that question we have never held that it is beyond the power of the State to provide for the trial by a jury of questions of fact because they are complicated. Cases at law triable by a jury in the federal courts often involve most difficult and complex questions, as for example, in patent cases at law presenting issues of validity and infringement. . . Most difficult questions of fact in protracted trials, with much conflicting expert testimony, are not infrequently presented in criminal cases triable by jury. The issue of life or death may be decided in such a case. We have held that a State may modify trial by jury or abolish it altogether . . . but never that the time-honored method of resolving questions of fact by a jury must be abandoned by a State under compulsion of the Federal Constitution. And we find no warrant for such a ruling now."

The court was also of the opinion that the manner of submitting the issues to the jury did not violate any constitutional right of the appellant.

The Supreme Court also considered the charges of confiscation. In this connection it should be pointed out that the Court of Civil Appeals had reduced the valuation of the property to $750,000. A review of the evidence found it sufficient to support this action.

As to the validity of the retroactive provision of the rate order the Supreme Court was equally divided and consequently that part of the order was also affirmed.

MR. JUSTICE REED took no part in the case.

MR. JUSTICE BLACK delivered a concurring opinion. In it he expressed disagreement with the view that a foreign corporation doing business in Texas comes within the protection of the Fourteenth Amendment. But assuming the applicability of the Fourteenth Amendment, he was of the opinion that the Court should not undertake to determine any question but that of confiscation (apart from procedural questions). He observed that the record disclosed a striking absence of satisfactory evidence of cost, funded indebtedness, the actual investments of stockholders, profits in past years, and the percentage of profits to actual investment. He also observed that the record showed the appellant to be an associate or affiliate of the Electric Bond and Share Company and the United States Gas System. Under these circumstances MR. JUSTICE BLACK was of the opinion that confiscation could not be proved merely by proof that the appellant's books show alleged expenditures purporting to have been made by or through affiliates. Concerning this he said:

"Not only did appellant fail to prove the reasonableness of its intercompany dealings, but it did not—as requested in open court—produce a *full* list of salaries paid by its associates, affiliates, etc. It is true that evidence did show that *some* of the officers of associates, affiliates, etc., received from $65,000 to $100,000 a year but there was no proof of the reasonableness of such salaries or of their effect upon appellant's local gas distribution expenses."

MR. JUSTICE BLACK also expressed his approval of the procedure of trying the issues before a jury as provided by the laws of Texas.

MR. JUSTICE MCREYNOLDS delivered a dissenting opinion in which MR. JUSTICE BUTLER concurred. In this opinion the view was taken that the appellant was afforded no adequate opportunity to obtain a fair judicial determination of its rights, and that the proceedings in the state courts were an empty show. In this connection MR. JUSTICE MCREYNOLDS said:

"The Court of Civil Appeals took the cause for review upon the record made in the District Court. The following excerpts from its opinion sufficiently indicate the reasons which moved it partly to sustain and partly to overrule the judgment of the trial court and finally to approve the Commission's action *in toto*.

" 'We have reached the conclusion that appellant not only failed to establish its claim for reversal and rendition of judgment in its favor, but that when viewed in the light of the presumption in favor of the validity of the Commission's rate order, and of the quantum and character of proof required to overcome such presumption, the evidence adduced was insufficient, as a matter of law, to show that the 55c rate order was either unjust and unreasonable or confiscatory. In view of this conclusion all questions of practice presented in "Part II" of the brief go out of the case.

" 'In absence of an actual test of the rate, the court on appeal must resolve all doubts against the complaining party; pare down valuations unsparingly; and the rate must appear to be clearly confiscatory, or unjust and unreasonable before the court should by injunction restrain its enforcement in advance of actual experience of the practical results of the rate.

" 'That in advance of any actual test of the practical result of the new rate, the court on appeal will not disturb the rate where it is based upon conflicting evidence as to valuations of property, or as to any other item used as a basis for the calculation of the rate; because to do so would merely substitute the findings of the court or jury upon conflicting evidence for that of the Commission, and would therefore permit the court to exercise the legislative function of ratemaking. R. R. Commission v. Shupee, 57 S. W. (2d), 295; affirming 73 S. W. (2d), 505. And that by "resolving all doubts against" the appellant "and using valuations pared down unsparingly," there could have been no reasonable doubt in the judicial mind that the 55c rate was neither confiscatory nor unjust and unreasonable. Newton v. Consolidated Gas Co., 258 U. S. 165.'

"Considering the rules which the Court of Civil Appeals declared applicable to the trial quite evidently appel-

lant had no adequate opportunity to submit the law and facts relevant to the controversy to a fair judicial tribunal for determination according to its own independent judgment.

"A tribunal required to accept weighty presumptions against a defendant, resolve all doubts against it, pare down valuations to the utmost and refuse a judgment in its favor when the evidence is conflicting as to valuations or other important elements, could not reach an independent judgment in respect of the law and facts—could not arrive at a fair judicial determination. To us the proceedings in the state courts seem an empty show."

The case was argued by Mr. F. G. Coates and John P. Bullington for appellant, and by Messrs. Alfred M. Scott and Edward H. Lange, for appellees. . .

Summaries of All Holdings in Other Opinions January 31 and up to February 28

Schools—Impairment of Contract of Public School Teacher

Indiana ex rel. Anderson v. Brand, 82 Adv. Op. 444; 58 Sup. Ct. Rep. 443. [No. 256, Decided Jan. 31, 1938].

Certiorari to review a judgment of the Supreme Court of Indiana, which had refused a writ of mandate whereby the petitioner sought to compel the respondent to continue her employment as a public school teacher. The respondent, trustee of the Chester School Township of Wabash County, had terminated petitioner's employment. Petitioner's complaint alleges that the termination was a breach of her contract with the school corporation.

Respondent demurred on two grounds: (1) that the complaint disclosed that the matters pleaded had been submitted to the respondent and the county superintendent, who were authorized to try the issues and that they had lawfully determined them in favor of the respondent; and (2) that the Teachers' Tenure Law, in its application to teachers in township schools, had been repealed. The demurrer was sustained by State Courts.

The Supreme Court, in an opinion by MR. JUSTICE ROBERTS, reversed the judgment. The opinion examines the Indiana legislation and concludes that its effect was to establish a contractual right to a permanent teacher's contract if certain conditions had been met, and that a contract so made could be terminated only upon certain specified conditions not present here. It concludes that so far as the federal constitutional question of impairment of contract was concerned, the petitioner had a valid permanent contract of indefinite duration, terminable only upon the grounds provided at the inception of the contract; and that an amendatory act passed in 1933 was ineffectual to deprive petitioner of her contractual rights.

The case was argued on Jan. 10, 1938, by Mr. Paul R. Shafer and Thomas F. O'Mara for the petitioner, and by Mr. Raymond F. Brooks and Asa J. Smith for the respondent.

Home Owners' Loan Act—Validity of Penal Provisions

Kay et al., v. United States, 82 Adv. Op. 418; 58 Sup. Ct. Rep. 468, [No. 61, Decided Jan. 31, 1938].

Certiorari to review convictions for violations under Section 8 (a) and (e) of the Home Owners' Loan Act of 1933, as amended. The convictions related to counts under Section 8(a) imposing penalties for making false statements to the Home Owners' Loan Corporation, or its Board, in connection with loans by the Corporation, and under Section 8(e) penalizing the making of any charge in connection with a loan under the Act except certain specified ordinary charges.

The Supreme Court, in an opinion by MR. CHIEF JUSTICE HUGHES, rejected petitioner's contention that the whole scheme of that Act was unconstitutional and that therefore the provisions of the Act penalizing fraudulent representations to the Home Owners' Loan Corporation fall with the whole statutory scheme. The CHIEF JUSTICE held that the petitioner was not entitled to raise the point since a person who undertakes to cheat the Government or mislead its officers by false statements has no right to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction.

A similar contention as to the invalidity of the penal provisions of Section 8(e), designed to prevent the exploitation of applicants, was disposed of on the same basis, the Court observing that the authority to penalize such exploitation cannot be regarded as dependent upon the validity of the general plan.

A question of practice on criminal appeals was also considered. The Circuit Court of Appeals had declined to consider objections to the judgment based upon a bill of exceptions, on the ground that the bill was settled and filed after the expiration of the time prescribed by the rule. But MR. CHIEF JUSTICE HUGHES observed that while the Court had rightly held that the bill of exceptions was filed out of time, its ruling on the question was rendered before the decision of the Supreme Court in *Ray v. United States,* 301 U.S. 158, construing Rule IV of the Criminal Appeal Rules, which was designed to give the Circuit Court of Appeals full supervision and control of the proceedings on appeal "including the proceedings relating to the preparation of the record on appeal." The opinion accordingly concludes that, since the Circuit Court of Appeals might have proceeded on the theory that it had no power to approve the settlement and the filing of the bill of exceptions and to pass upon the rulings contained in it, the judgment should be vacated and the cause remanded to enable the court below to exercise its discretion to prevent any miscarriage of justice.

This case was argued on Dec. 10 and 13, 1937, by Mr. Frank R. Serri and Mr. William S. Culbertson for the petitioner, and by Mr. Assistant Solicitor General Bell for the respondent.

Limitations — Commencement of Actions — Suits Against United States—War Risk Insurance—Conformity with State Law

Munro vs. United States, 82 Adv. Op. 424; 58 Sup. Ct. Rep. 421, [No. 218, decided January 31, 1938].

Certiorari to review a judgment which dismissed an action on a War Risk Insurance Policy as not

having been brought within the time prescribed by § 19 of the World War Veterans' Act of 1924. The bar of the statute fell on July 1, 1933. Praecipe for summons was filed and summons served upon the United States Attorney and mailed to the Attorney General prior to that time, but the complaint was not served or filed until after that date. The United States Attorney appeared and answered without raising the question of timeliness of suit. Later he moved to dismiss on that ground.

The Court's opinion by MR. JUSTICE MCREYNOLDS holds that U. S. C., Title 28, §§ 762 and 763, are applicable to this action and state the condition on which the United States has consented to be sued. These sections require that a petition be filed with the clerk and a copy be served upon the district attorney and another mailed to the Attorney General. Since they had not been complied with prior to the date upon which the right of action expired, the suit was not brought in time to toll the statute. It was also held that the Conformity Act can not alter these statutory requirements and that the district attorney, by answer or otherwise, could not waive them.

The case was argued on January 7, 1938, by Mr. Charles H. Kendall for the petitioner and by Mr. Julius C. Martin for the respondent.

Taxation—State Tax on Net Income Under Government Contract—Territorial Jurisdiction of States and United States

Atkinson, etc. vs. State Tax Commission of Oregon, et al., 82 Adv. Op. 440; 58 Sup. Ct. Rep. 419 [No. 303, decided January 31, 1938].

Appeal from Oregon Supreme Court challenging constitutionality of State personal income tax applied to net income of contractor derived from work within exterior boundaries of state in construction of Bonneville Dam, on Columbia River, under contract with United States, on the ground (1) that it burdened the operations of the Federal Government and (2) that the area within which the work was done was within the exclusive jurisdiction of the United States.

The Court's *per curiam* opinion denies the first contention on the authority of previous decisions. The opinion also denies the second contention for the reason that (a) the title to the bed of the Columbia River upon which the main structural work was placed did not belong to the United States, but remained in the State, subject to the dominant right of the Federal Government to exercise its constitutional functions and (b) although the title to Bradford Island and a portion of the mainland had been purchased by the United States after enactment of an Oregon statute which gave consent to such a purchase, with a proviso that the United States should have "the right of exclusive jurisdiction over the same" saving only the authority of the State for the service of process, yet the United States had not accepted and did not intend to exercise exclusive legislative authority over the project. The Court believed this to be evidenced by the Government's contract requiring Federal contractors to provide workmen's compensation under the state law. Thus the opinion affirms the State Court's decision that the State retained territorial jurisdiction to the extent that its exercise does not interfere with the Federal project and concludes that the tax in question does not constitute such an interference.

The case was argued on January 13, 1938, by Mr. Howard P. Arnest for the appellants and by Mr. Carl E. Davidson for the appellees.

Federal Income Tax—Taxable Dividends

Foster et al. vs. United States, 82 Adv. Op. 416; 58 Sup. Ct. Rep. 424 [No. 189, decided January 31, 1938].

Certiorari to review a judgment of the Court of Claims involving a claim for income tax refund on the ground that the income upon which the tax was based originated in a 1930 corporate dividend which was tax exempt because it represented corporate earnings accumulated prior to March 1, 1913. The contention was predicated upon the theory that a previous 1929 distribution of corporate surplus paid by the company to cancel and liquidate certain shares of its own stock had exhausted post-1913 earnings; that therefore the 1930 dividend must be traceable to pre-1913 accumulations and was tax exempt under subsections (a) and (b) of § 115 of the Revenue Act of 1928, which excluded dividends and earnings out of earnings and profits accumulated before March 1, 1913, and provided that all distributions are deemed paid from the most recently accumulated earnings.

The Court's opinion by MR. JUSTICE BLACK rejects this contention for the reason that to recognize it would defeat the purpose of Congress to prevent corporations from attributing dividend payments to pre-1919 accumulations to avoid taxes imposed upon post-1913 earnings, and would permit accounting devices to devitalize the law. The opinion finds that under § 115, subsection (c), distributions such as that of 1929 here in issue should be chargeable to the capital account and that the 1929 liquidation of stock should not be considered for the purpose of determining the taxability of subsequent distributions by the corporation. From this viewpoint the 1930 dividend was held to be paid out of post-1930 earnings and to be taxable accordingly.

The case was argued on January 10 and 11, 1938, by Mr. William P. McCool for the petitioner, and by Mr. Arnold Raum for the respondent.

Admiralty—International Law—Jurisdiction of District Courts—Public Vessels

Compañia Española De Navegación Marítima, S. A., Owner of the Spanish Steamship "Navemar", vs. Spanish Steamship "Navemar", Her Engines, etc., et al., 82 Adv. Op. 426; 58 Sup. Ct. Rep. 432 [No. 242, decided January 31, 1938].

The alleged owner of a Spanish merchant vessel, "Navemar", in New York harbor, brought suit in admiralty in a federal district court in New York to obtain possession of the vessel which was alleged to have been taken from its possession by the crew. The Spanish Ambassador requested the Department of State to act upon the Spanish Government's claim. Upon refusal he asked leave to intervene in the case on allegations that the vessel had become the property of the Spanish Republic by a decree promulgated by the President of that Republic appropriating the vessel to public use, and was therefore immune from arrest and process of that court.

The district court held the proof insufficient to establish ownership by the Spanish Government and refused to dismiss the case for lack of jurisdiction. The Circuit Court held to the contrary. Certiorari was allowed because the case was deemed of public importance and because of conflict of decisions.

In an opinion by MR. JUSTICE STONE, the Court held that, since the Department of State had refused to act, the question of the Court's jurisdiction because of the vessel's public status and of the Spanish right

to its possession were appropriate subjects for judicial inquiry and proof, and that under such circumstances the district court was not required to consider the suggestions presented by the Spanish Government in support of its position as conclusive proof of its allegations of the lack of the Court's jurisdiction. The opinion also concludes that the evidence before the district court did not support the claim that the vessel had been in the possession of the Spanish Government, since that evidence did not show that the necessary actual possession by some act of physical domination or control in behalf of the Government had been exercised under the decree of attachment. But the Court also concludes that the district court should have permitted the Ambassador to intervene to litigate the Spanish Government's claim to the vessel in the suit.

The case was argued on January 7 and 10, 1938, by Mr. T. Catesby Jones for the petitioner, and by Mr. Charles W. Hagen for the respondent.

Attachment—Exemption—"Seaman" Defined

Blackton vs. Gordon, 82 Adv. Op. 414; 58 Sup. Ct. Rep. 417 [No. 167, decided January 31, 1938].

Certiorari involving the question whether the master of a vessel is entitled to the benefit of § 12 of the Act of March 4, 1915, which exempts the wages of "seamen" from attachment.

The opinion of MR. JUSTICE ROBERTS finds that the intention of Congress is expressed in § 12 of the Act of 1915 which, in all matters affecting wages, treats seamen as a class from which masters are excluded, and that, in the light of the legislative setting, masters are, therefore, not entitled to the claimed exemption.

The case was argued on January 5, 1938, by Mr. Aaron Gordon for the respondent, and by Mr. Clement K. Corbin and Mr. E. A. Markley for the petitioner.

District Court's Jurisdiction—Injunctions—Jurisdictional Amount

Henneford et al. vs. Northern Pacific Railway Co., 82 Adv. Op. 443; 58 Sup. Ct. Rep. 415 [No. 243, decided January 31, 1938].

Appeal from a decree of a three-judge district court which permanently enjoined as unconstitutional the collection from the respondent of the 2% "compensating tax" of the State of Washington (Wash., L. 1935, ch. 180, Tit. IV) on account of commodities purchased in other states and transported into Washington.

The Court's *per curiam* opinion concludes that the bill should have been dismissed as not involving the required jurisdictional amount since the complaint on its face shows that the tax, the enforcement of which was sought to be enjoined, amounted only to $2,044.08 and that the damages alleged in the complaint would be incurred only by failure to make the required payment. The opinion denies the taxpayer's motion to present affidavits showing the amount of the tax for succeeding months, since it concludes that the jurisdiction of the district court should be tested by the allegations of the complaint.

The case was argued on January 11, 1938, by Mr. R. G. Sharpe for the appellants, and by Mr. M. L. Countryman, Jr., for the appellee.

Patents—Finality of Court of Claims Findings of Fact—Suits Against United States

United States vs. Esnault-Pelterie, 82 Adv. Op. 436; 58 Sup. Ct. Rep. 412 [No. 231, decided January 31, 1938].

Certiorari to the Court of Claims involving the finality of that court's findings that the United States had infringed certain claims of the Esnault-Pelterie patent for an invention for the control of the equilibrium of air planes, and that the patent is valid.

The Court's *per curiam* opinion holds that the legislation, by which Congress has permitted the United States to be sued for patent infringements (U. S. C., Title 35, § 68), and the appellate rules applicable in such cases, limit review by the Supreme Court of the findings of the Court of Claims, to questions of law; that in the Court of Claims questions of validity and of infringement of patents are questions of fact to be treated like the verdict of a jury; and that in the instant case, since the whole testimony is not and could not properly be before the Supreme Court, and since here the ultimate findings of validity and infringement are not necessarily overborne by the subordinate findings, the Supreme Court can not attempt to pass upon the questions that would be involved in overruling the conclusions of fact reached by the Court of Claims.

MR. JUSTICE BLACK was of opinion that the findings did not show infringement of any valid patent, and therefore that the judgment of the Court of Claims should be reversed.

The case was argued on January 7, 1938, by Mr. Drury W. Cooper for the petitioner, and by Mr. George T. Bean and Mr. Eugene V. Myers for the respondent.

Appeals — Substantial Federal Question — Rate Making—Adequacy of Judicial Review Under State Practice

New York ex rel Consolidated Water Co. of Utica vs. Maltbie et al., 82 Adv. Op. 489; 58 Sup. Ct. Rep. 506 [No. 380, decided February 14, 1938].

Appeal from New York state court decision in a certiorari proceeding under the state practice which upheld the action of the State Public Service Commission in fixing water rates, against charges of confiscation in violation of the due process and equal protection clauses of the United States Constitution.

On motion to dismiss the appeal for lack of a substantial federal question, the Supreme Court's *per curiam* opinion holds (1) that appellants' contention that the limitations imposed by the state practice upon certiorari proceedings have prevented him from receiving the judgment of a court of law as to the law and facts with respect to the issue of confiscation, is not available to appellant as he had not sought the plenary jurisdiction of a court of equity, and it did not appear that this remedy was unavailable under state law; and (2) that, since the state practice limits review on certiorari to questions of law, no substantial federal question is presented. For these reasons the appeal was dismissed.

The case was argued on February 3 and 4, 1938, by Mr. Thayer Burgess for appellant and by Mr. Gay H. Brown for appellees.

Criminal Procedure—Appeals—Circuit Court Rules —Assignments of Error

Lonergan vs. United States, 82 Adv. Op. 434; 58 Sup. Ct. Rep. 430 [No. 121, decided January 31, 1938].

Certiorari involving the construction of Rule 11 of the Rules of the Circuit Court of Appeals of the 9th Circuit, as applied to assignments of error in a judgment of conviction for violation of § 215 of the

Criminal Code by using the mails to defraud. The rule required the assignment of error "to quote the full substance of the evidence admitted or rejected". Pending decision of the appeal in the instant case, the Court amended this rule by adding a requirement that it should also quote "the ground urged at the trial for the objection and the exception taken." The Circuit Court held that the rule even before its amendment required the objection and its grounds to be stated in the assignment.

The Supreme Court's opinion by MR. JUSTICE MCREYNOLDS held that this was a wrong interpretation of the rule and that the requirement of the later amendment was inapplicable since the petitioner had the right to rely on the rule properly construed as it stood at the time of his appeal. The opinion then examined one of the rejected assignments, found it sufficiently definite and formal to meet the requirements of the rule, and to require consideration by the Circuit Court, and therefore remanded the case for further proceedings.

The case was argued on January 10, 1938, by Mr. Pierce Lonergan for the petitioner, and by Mr. J. Albert Woll for the respondent.

Limitations—Amendment of Complaint—Cause of Action Defined

Maty, etc. vs. Grasselli Chemical Company, 82 Adv. Op. 486; 58 Sup. Ct. Rep 507 [No. 378, decided February 14, 1938].

Certiorari to review district court decision in action removed from New Jersey State Court dismissing an amended complaint as barred by the state statute of limitations. The original complaint alleged injuries to plaintiff while he was employed in the silicate department of defendant's chemical plant. The amendment, made two years later, and after the statutory period had passed, broadened the description of the place of employment to include the phosphate department in the same plant but in a different building.

The Court's opinion by MR. JUSTICE BLACK holds that the amendment did not change plaintiff's cause of action but related only to one recovery for one single injury as a result of a breach of one continuous duty under one continuous employment and that, under the New Jersey law such an amended cause of action is not barred by the statute.

The case was argued on February 3, 1938, by Mr. Thomas F. Gain for petitioner and by Mr. Louis Rudner for respondent.

JUNIOR BAR NOTES

BY PAUL F. HANNAH

Secretary of Junior Bar Conference

THE Conference Public Information program continued to keynote Junior Bar activities during February.

The Public Information research committee in the District of Columbia has completed and made ready for distribution bibliographies on four additional topics: "The Position of the American Bar Association on the Child Labor Problem", by Leo N. McGuire; "Accelerating the Judicial Process", by James DeValse Mann; "The Small Claims Court", by Louis O. Hodges, Jr.; and the "Juvenile Crime Problem", by Elisabeth W. Pope. The bibliographies on citizenship topics have been effectively supplemented by eight speech outlines prepared by Robert G. Burke and his committee in New York. Copies of these outlines will be supplied upon request by the American Bar Association headquarters.

Speaking programs are now under way in many localities. Kenneth F. Neu, local director at Mason City, Iowa, reports that he has staged a three-night radio debate on the integrated bar, and has arranged a monthly Conference program a month over Station KGLO. To develop a better understanding of the trial and jury system, the Junior Bar in Connecticut, led by Benedict M. Holden, Jr., and J. Ronald Regnier, recently put on a mock trial before an organization in Hartford County. The Connecticut group is developing with the Board of Education of Hartford a program of addresses before the evening schools. In the District of Columbia, invitations issued in the middle of February to all civic, social, and fraternal organizations to utilize Conference speakers are meeting with hearty response. These activities are cited only as typical of what is going on in all parts of the country.

More than forty-eight local directors of Public Information were appointed between January 20 and February 22, according to Milford Springer, National Director. Those appointed include: In New Jersey: Theodore J. Labrecque, Red Bank; Julius Sklar, Camden; Joseph Halpin, Somerville; Ralph Fusco, Perth Amboy; E. Herbert Keifer, Clinton; J. Elmer Matthews, Phillipsburg; Robert W. Norris, Camden; Eugene J. Kaplan, Newark; Aubrey J. Elias, Passaic; Ralph A. Corbin, Passaic; Samuel Marantz, Elizabeth; Emil M. Wulster, Hackensack; and Augustine C. Repetto, Atlantic City. In Georgia: J. N. Peacock, Jr., Albany; John W. Maddox, Rome; George W. Williams, Cordele; Frank L. Forester, Thomasville; Graham W. George, Decatur; Hawkins Dykes, Americus; W. W. Mundy, Jr., Cedartown; J. Littleton Glover, Newnan; M. H. Blackshear, Jr., Dublin; Bernard N. Nightingale, Brunswick; William B. Withers, Moultrie; and Edwin L. Sterne, Atlanta. In California: Harold W. Schweitzer, Los Angeles; and Melvin Belli, San Francisco. In Ohio: William C. Warren, Cleveland. In Texas: LaVergne F. Guinn, Dallas. In Oklahoma: Jack E. High, Oklahoma City; and Harry L. Fitzgerald, Jr., Tulsa. In Indiana: Joseph S. Hatfield, Evansville; Francis M. Hughes, Indianapolis; Lloyd C. Adamson, Terre Haute; James F. Thornburg, South Bend; Carl G. DeFur, Muncie; Donald D. O'Neill, Loganport; Charles G. Bomberger, Hammond; and Robert W. Crasher, Marion. In Maine: John O. Rogers, Caribou; Parker Burleigh, Jr., Presque Isle; George F. Eaton, Bangor; Paul L. Powers, Freeport; John G. Marshall, Auburn; Frank W. Bjorklund, Norway;

Edmund Sweeney, Waterville; and Lois Birkenwald, Augusta.

The Northwest, Southwest and Middle West were scenes of regional meetings held during late January and February.

Under the leadership of Grant B. Cooper, Ninth Circuit Council member, a conference of the State Chairmen and American Citizenship Committee members from California, Oregon, Nevada and Washington was held on January 29th in San Francisco, at which detailed plans were laid for execution of the Conference program and for increasing Conference membership. Attending the meeting, in addition to the Chairmen, were: Harold W. Schweitzer and James Ingebretsen of Los Angeles; Frank B. Gregory and Charles M. Merrill of Reno, Nevada; Edward B. Hanley, Jr., of Seattle, Washington, and William B. Bartle of Eugene, Oregon.

The State Chairmen of Ohio and Michigan, the Ohio Director of Public Information and the Ohio American Citizenship Committee member met with Earl Morris, Sixth Circuit Council member, in Columbus on January 29 and 30. It was there decided to concentrate in the Sixth Circuit upon membership work and the American Citizenship program. James A. Gleason of Cleveland, Ohio, Leroy W. Dahlberg of Detroit, Michigan, William C. Warren of Cleveland, Ohio, and E. Clark Morrow of Columbus Ohio, attended the meeting.

The most extensive regional meeting held to date took place in Dallas, Texas, on February 21, attended by many members of the Conference from Texas, Oklahoma, Arkansas and Louisiana. The meeting opened with a welcoming speech by Hon. George Sprague, Mayor of Dallas, and remarks from Woodall Rogers, President of the Dallas Bar Association; Frank Bezoni, President of the Texas Junior Bar Association; and Fred Martin, President of the Junior Bar Association of Dallas. Weston Vernon, Jr., Chairman of the Conference, made the principal address of the morning session, and was followed by Oliver P. Stockwell, State Chairman of Louisiana, who outlined the advantages of membership in the Conference. In the afternoon, LaVergne Guinn led an open forum discussion on the Public Information program; James Fellers, State Chairman of Oklahoma, directed the debate on the unauthorized practice of law and Robert M. Clark, Chairman of the Conference Membership Committee, discussed membership activities. A smoker and buffet supper followed the formal sessions. The meeting was voted a great success and greater activity in the Southwest is expected to result.

In addition to the national conferences, two state meetings were held. On February 4, the District and County Chairmen in New Jersey met in Newark to discuss details of the American Citizenship program. Oklahoma Conference members met in Tulsa late in January in conjunction with the State Bar convention, and there organized, under the leadership of James Fellers, State Chairman, the Oklahoma Division of the Conference. William W. Whiteman, Jr., and Bland West were made Vice-Chairman and Secretary, respectively, of the Division. At the meeting Mr. Fellers named chairmen for each congressional district to serve as the Executive Council of the State group. The public information program was made the principal activity for this year of the Division. The first of its kind held in the state, the meeting evoked keen interest and enthusiasm among the younger members of the Oklahoma bar.

A signal contribution to membership work was made last month by the Kansas Junior Bar and the State Bar Association, which sponsored, on February 9, a dinner for the newly admitted members of the Kansas bar. An account of this appears elsewhere in this issue.

Membership drives, in which the Conference took prominent part, have recently been completed in New Jersey and the District of Columbia with considerable success. Nearly two hundred lawyers joined the Association in the Garden State, and over eighty were enrolled from the District of Columbia. In Washington, card indices of all lawyers who were not members of the American Bar Association was prepared in duplicate, and will serve as a permanent file for use in future campaigns or for individual solicitations.

* *

Kansas, which, under the able leadership of Frank Eckdall, Bob Clark and Phil Lewis, is showing its heels to most states in Conference activity, has recently organized the Kansas Junior Bar Conference, membership in which is restricted to members of the Junior Bar Conference of the American Bar Association residing in Kansas. By-Laws adopted by a state referendum provide for appointment of the Chairman by the Junior Bar Conference Chairman, but for election of a Vice-Chairman and Secretary-Treasurer by Kansas Conference members. The Council is composed of one member from each Congressional District, who is elected by the members in his District, has extensive powers, and has already held several meetings. The By-Laws provide for eight committees, to be appointed by the Chairman, and provisions are made also for the organization of district junior bars. The plan of organization of the Kansas Junior Bar Conference is particularly interesting because of the degree of coordination it provides between state and national activities, and is well worth the study of groups in other states.

* *

Donald B. Hatmaker, Chairman of the Activities Committee, reports that in the first week after mailing, about eight hundred replies to the questionnaire have been received. It is particularly interesting to note that members so far have definitely indicated a willingness to devote approximately twelve hundred hours per week to Conference affairs. Figuring a six hour day this would be equivalent to more than ten thousand full days each year.

The replies are being tabulated now by the Activities Committee for distribution to all State and other Chairmen as soon as possible. This will aid the various parts of the country during the remainder of the present year in coordinating their work and will facilitate activities next year. In addition the comments undoubtedly disclose new fields of worth-while endeavor for future consideration.

Every member who has not already filled out and sent in his questionnaire is urgently requested to do so immediately so that final tabulations may be completed.

* *

Your Secretary would like to be able to report, each month, the Conference activities taking place in each state. This he can do, however, only if the State Chairmen keep him posted. Let's have less modesty —and more news!

THE SACCO-VANZETTI CASE: A TRAGIC EPILOGUE

Mr. George R. Farnum Writes About It Under Title of "Webster Thayer: The Last Phase" in Journal of the Law Society of Massachusetts (Feb.)

MARCH 1, 1917, appeared an auspicious day in the life of Webster Thayer—that day when he assumed his place as a member of the Superior Court of Massachusetts. Few men had come to the Court seemingly better qualified. From those sturdy New England ancestors, who had early settled in the Blackstone Valley, he derived not only fine upstanding ideals but a physical inheritance which early showed itself in his brilliant athletic achievements at Dartmouth College, and later in the stamina which first enabled him to carry lightly the fatigues of the life of a busy advocate, and afterwards the burdens of the work of the Bench. He was learned in the science of his profession and skilled in its practice after years of experience which had earned him the position of one of the undisputed leaders of the Worcester County Bar. It was before a jury, however, that his talents were most conspicuously displayed. He was of equable temperament, indued with a scrupulous sense of justice and possessed of the highest standards of professional honor.

On that fateful day, the omens certainly appeared favorable to a congenial as well as a brilliant career on the Court. The early years of his judicial life justified these prognostics. He took his work with deep seriousness and he discharged his duties with a conspicuous ability. One of his former colleagues on the Court recently remarked to me that he never knew a more conscientious and high-minded judge. It was said of him that his charges were somewhat over elaborate for the easy comprehension of the average run of juries, and he was undoubtedly deficient in a measurable sense of humor. He unquestionably possessed a generous measure of self-assurance and a certain confidence in his own judgment from which sprang a somewhat exaggerated tenacity of opinion. But, in this slender enumeration of his faults—if such they can be fairly called—the plethora of his merits is adequately implied. March 1, 1917, then, and for some time thereafter, seemed a happy milestone in his progressively useful and happy life. But, in their inscrutable way, the fates were spinning a tragic web that eventful day, and there must have been something peculiarly sinister in the conjunction of the planets for those who could read their enigmatical cipher.

On the fifteenth day of April, 1920, two men were brutally shot during the course of a payroll robbery at Braintree. On the eleventh of the following September, Sacco and Vanzetti were indicted for their murder. But as yet these tragic events seemed to have no relation to the destiny of Webster Thayer. On May 31, 1921, however, these men were brought to trial with Judge Thayer presiding. After an epic forensic battle, on the fourteenth day the following July they were both found guilty.

Twelve years Judge Thayer was to live to face the devastating aftermath of that fateful verdict—twelve years of unremitting criticism, persistent misrepresentation, violent abuse, and ruthless persecution and threats which finally culminated in the bombing of his home. The case itself, with the tale of many another episode in the history of the administration of human justice, is now for most people of but historic interest in the closed book of the past. But the pitiful and heroic story of how this man faced his destiny and carried on to the end deserves to live on.

Whether he made any mistakes or not in the conduct of the trial and during those steps which followed it, I have no idea and venture no opinion. Perhaps it is not inappropriate to point out, however, that his rulings were reviewed and sustained by the Supreme Judicial Court and the whole proceedings were painstakingly re-examined and all available facts re-studied by the so-called Lowell Committee, appointed by the Governor and consisting of the Presidents of Harvard University and The Massachusetts Institute of Technology and Judge Robert Grant. This Committee concluded that the trial was in all particulars fairly conducted. At all events, no one who knew Judge Thayer ever doubted—or ever could doubt—his deep anxiety in this, as in every other case with which he was concerned, to see that every right of the accused was sedulously preserved, justice fairly administered throughout, and truth and right fully and practically vindicated in the result. The extent to which he would frequently go to insure the protection of the rights of defendants in criminal cases was a well established tradition at the Bar. In one instance, it is related that he advised the defendant to actually withdraw his plea of guilty on a serious charge and, as a sequel of his personal inquiries, the accused was ultimately discharged.

There was something peculiarly lacerating to such a man in the charge that he was deliberately unfair and, above all, in a capital case. It did not lighten the intolerable burden or assuage the cruel ache that many of those who joined in pillorying him had never qualified themselves as critics by any adequate investigation of the facts.

Unhappily, too, as I have indicated, he was deficient by nature in the saving grace of humor which would have softened, by an apprehension of the incongruities, something of the stark and brutal harshness of the repercussion of the general clamor upon his acute sensibilities. The persistence of the public agitation, the constant presence of a protective escort and the guard about his home never afforded him the chance of escape from the cruel reminders of his fate. To a large measure he necessarily bore his heavy cross in social isolation and inner loneliness. There was no surcease to be found, no discoverable amelioration of his lot, except in the resources of his own perturbed spirit. The threats to which he was subjected would probably not have greatly shaken his nerve or seriously affected his personal courage. The safety of his family,

*This article appears in the February issue of the Journal of the Law Society of Massachusetts, and is reprinted by permission. The author, Mr. George R. Farnum, of Boston, is a former Assistant Attorney General of the United States and is chairman of the Association's Committee on Admiralty and Maritime Law.

however, was the cause of grave and ever-increasing anxiety.

It seemed to some—possibly without entire justification—that, in those days when the support of the profession and public would have meant much to him, there was a certain apathy toward his plight, a measure of indifference to his tragic situation. If he himself shared this feeling, probably it cut deep. However, he suppressed any public manifestation of his emotions, though it is said that, among his friends, what he deemed the intolerable injustice of his plight and its seemingly inextricable character frequently evoked passionate outbursts of protest. As the days went by he found it progressively more difficult to follow the injunction of Leonardo da Vinci to put on with the doubling of misfortunes the double cloak of endurance.

During the protraction of his martyrdom, the burden of his feelings exacted its toll from his health. The destructive inroads of advancing years were painfully accelerated. In the fall of 1932 came the outrageous bombing of his home. That day marked the beginning of the end. He went through the winter, his indomitable will sustaining the tortured mind and racked body. His isolation was increased. He was a man virtually without a home. He never again returned to his beloved Worcester to live. It has even been rumored that he received a hint that, under the circumstances, his continued presence there would be an onerous responsibility to the community. One of the most pathetic pictures ever drawn for me was in the words of one of his Superior Court colleagues of how, during a term of the Court at Cambridge, at lunch, he eschewed the table of his associates and sat apart a pathetic figure in the company of his guard. With the coming of spring he found release from the pains of life and final escape from his troubles.

As I write these lines, in the cemetery in Worcester, where he rests among his ancestors, the autumn foliage is fading out and the leaves are falling from the trees and shrubbery. The disconsolate wind sighs amid the half denuded branches of the trees and breathes the chill of approaching winter. Somehow the season itself imparts a poignant melancholy to the thoughts this theme evokes. But the agitation of the crowd and the injustices and tribulations of life no longer beat upon his spirit. Here they are forever excluded. Here reigns eternally what Turgenev has somewhere described as the great rest of indifferent nature. After life's fitful fever, Webster Thayer sleeps well.

LEGAL ETHICS AND PROFESSIONAL DISCIPLINE

Florida Court has Lost Power to Integrate Bar by Rule

THE Supreme Court of Florida recently denied a petition addressed to it by the State Bar Association requesting it by order to assume control of admissions to the bar, disbarments, and unauthorized practice of law, on the ground that it could not disturb a legislative practice that had been accepted over one hundred years. It held that it could fix the educational requirements for admission to the bar because of a statute which vested it with authority to prescribe courses of study for this purpose and it made two years of college work and three years of day-school or four years of night-school study the conditions of admission to the Bar.

As to the other matters, however, the Court, in a twenty-seven page opinion written by Mr. Justice Terrell, said that, while it approved the "well nigh universal doctrine that the power to regulate such matters is in the courts," the situation in Florida is that the courts failed to assert this prerogative at the proper time.

"The legislature entered the field and regulated for more than 100 years. The courts acquiesced and approved repeatedly. Approval of the proposed rules 2 and 3 would amount to an attempted repeal of the acts of the legislature prescribing requirements for admission to the bar, and disbarring for unprofessional conduct.

"If it could be done, it would be unbecoming and improper to attempt the results sought in this way. If a change in policy is to be effected, it should be done in orderly fashion after the legislature has withdrawn from the field."

To say that the powers referred to are inherent and to imply that the court could have exercised them if the legislature had never done so is to assert that the powers are judicial powers. If so, they are by the constitution conferred upon the courts. To hold that they can be so lost as that their reacquirement depends upon the legislative determination voluntarily to withdraw from a field which it unconstitutionally entered in the beginning, is a novel constitutional pronouncement.

Restriction on Admission to the Bar to Be Considered by the Queens County Bar Association

Among the "Matters of Moment" listed by President Edward A. Coleman of the Queens County Bar Association to be considered at its meeting on February 14 was "Restriction on Admission to the Bar." Concerning this matter, President Coleman said:

"I am sure every member of the bench and bar has meditated at some time on this subject, not necessarily from a financial point of view, but, more definitely, from the standpoint of ethics and qualifications.

"Today the bar is criticized by public officials, the press and the public, and, in some instances, these criticisms were not unjustified for we all know that there have been members of the bench and bar who have proved false to their oath. At times it has proved difficult, almost impossible, to expose them and cast them from our profession. Therefore, it is apparent that additional safeguards are required to prevent their admission. This will be another step toward restoring our profession to its age-honored position and once again restoring the confidence and respect of the public."

Improper Publicizing of Court Proceedings

The Judicial Council of the State of New York in its Fourth Annual Report (p. 45) recommends to the justices of the Appellate Division the adoption of a rule similar to the new Canon 35 of the Canons of Judicial Ethics adopted by the American Bar Association in September, 1937. The new canon, relating to

the publicizing of court procedure, reads as follows: "Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the minds of the public and should not be permitted."

Los Angeles Bar Moves to Stop Improper Influence Upon Courts and Juries

As a result of its concern about attempts of unscrupulous persons, through newspaper articles, radio addresses and the like, to influence courts and juries in respect to pending cases, the Los Angeles Bar Association recently passed the following resolution:

"Whereas it is common knowledge that there is a growing tendency on the part of unscrupulous or unthinking persons to endeavor to influence the verdicts of juries and the judgments of judges in pending litigation through public addresses, radio broadcasts, and newspaper articles and by more insidious methods; and

"Whereas, unless such attempts are stopped, our entire system for the administration of justice will be imperiled; and

"Whereas all lawyers are officers of the courts and as such demand that every litigant shall have a fair trial before an unbiased jury or judge in the manner provided by law; and

"Whereas the membership of the Los Angeles Bar Association is representative of the entire community and in vigorously resisting these attempts has no selfish interest to serve;

"*Now, therefore, be it resolved,* That a standing committee of nine members to be appointed by the president of the association, be, and the same is hereby created, to be known as the Committee for the Protection of Judicial Independence, whose duty it shall be to investigate from time to time any and all attempts which may be made by public addresses, radio broadcasts, newspaper articles, or otherwise, to influence the determination by any judge or jury, together with all attempts to belittle our courts or bring the same into disrepute, and to report from time to time to the board of trustees of this association the results of its investigation, together with recommendations as to the proceedings which it feels the Los Angeles Bar Association should take to correct abuses."

Practice of Law by Judicial Officers

Judicial and quasi-judicial officers whose salaries exceed a specified amount a year should be prohibited from practicing law, the New York State Judicial Council declares in its fourth annual report.

The council holds that judicial officers should not practice law but should devote their time exclusively to their judicial duties. At present such officers are restricted in this respect, depending on the population of the area for which they are elected. The test, however, should be whether the official compensation is sufficient as a livelihood, the council states. As a reasonable standard for applying restrictions, it suggests annual compensation of $6,000 or more.

"The council has pointed out, also, that such restrictions now or hereafter established in the Constitution should be extended to apply to certain Government employes not now prohibited from privately practicing law. They include certain judicial officers, other than those mentioned in the Constitution, and certain Government officers and employes, not of the strictly judicial class, who are regularly employed as distinguished from those specially employed for a particular purpose."

Amended Canons of Professional Ethics Approved

The Council of the North Carolina State Bar Association appears to be the first organization to adopt the Canons of Professional Ethics as amended by the Association at the last Annual Meeting. They will be presented to the State Bar for adoption at its next meeting on May fifth.

HERSCHEL V. ARANT,
Secretary, Committee on Professional Ethics and Grievances.

CHAIRMEN OF THREE COMMITTEES OF THE AMERICAN BAR ASSOCIATION

THE FEDERAL JUDICIARY

Comment on Provisions of H. R. 8892, Recently Introduced in the House of Representatives—It Would Destroy Trial by Jury as It Existed at Common Law, It Would Nullify New Federal Rules of Procedure Adopted by the Supreme Court after Three Years of Study by Leading Members of the Profession, and It Would Virtually Deny Access to the Federal Courts to Corporations Doing Business of an Interstate Character—What the Requirement That State Practice Be Followed in Respect to the Charge to the Jury and the Right of the Judge to Comment on the Evidence Means as a Practical Matter—Constitutional Considerations—Value of Jurisdiction Based on Diversity of Citizenship, etc.*

By Hon. John J. Parker
Senior Circuit Judge, Fourth Circuit Court of Appeals.

THERE has recently been introduced into the lower house of Congress a bill H. R. No. 8892, which would accomplish three things (1) by providing that the state practice shall be followed with respect to the charging of the jury and the right of the judge to comment upon the evidence, it would destroy trial by jury as it existed at common law; (2) by reenacting the provisions of the Conformity Act, it would nullify the new federal rules of procedure adopted by the Supreme Court after three years of study by leading lawyers and law professors of the United States and embodying, I think, the best and simplest code of practice that has ever been devised; and (3) by providing that a corporation shall be deemed a citizen of a state where it is doing business with respect to any cause of action arising in such state, it would virtually deny access to the federal courts to corporations doing business of an interstate character. A bill to accomplish the first of these objectives actually passed the lower house at the last session. A consideration of these proposals, together with much talk that has recently been had with respect to the right and power of the courts to declare acts of Congress and of State Legislatures unconstitutional, leads me to believe that it may not be amiss to give consideration to the status of our federal judiciary and the merit or demerit of the proposals to which I have referred.

The judicial power of our federal government is vested by the Constitution in one Supreme Court and such inferior courts as Congress shall from time to time ordain and establish; and notwithstanding the abuse which has at times been heaped upon the federal judiciary, I am persuaded that no one really desires that this branch of the government be destroyed. Very slight consideration, indeed, must lead any thinking man to the conclusion that our federal system could no more exist without it than without either of the other coordinate branches. The judicial branch of the federal government is necessary to provide for the interpretation and enforcement of the laws essential to the very existence of the national government. It is necessary in order that impartial tribunals may be provided to which citizens who trade, travel or do business in states other than the states of their domicile may resort. It is necessary in order that the states and the federal government and the various coordinate branches of the federal government may be held within their proper spheres of activity under one constitutional system. We should examine, then, what is required of our courts for the discharge of these vitally important functions, what sort of courts we should have to meet these requirements, and how the various proposals to which I have referred would affect the courts in the discharge of their functions.

I shall pass by such general considerations as the necessity for securing on the federal bench men of character and ability and of rendering them independent of the vicissitudes of politics or of the necessity of earning a livelihood. And I shall assume that there is no serious question but that these objectives can be attained only by appointing the judges for life or good behavior and guaranteeing them compensation which cannot be reduced during their continuation in office. I come first to a consideration of the power which the judge must have for the trial of actions at law in the federal courts. Is he to be a mere moderator of a town meeting charged with no higher duty than to preserve order and rule on the conflicting contentions of the parties, or is he charged with responsibility for seeing that justice is done in his court? My answer is that he must be clothed with the full powers of a judge and must be charged with responsibility for the administration of justice. In cases arising under the Constitution and laws of the United States he is called upon to apply complicated and unfamiliar statutes to cases of the highest public importance, often in communities where the law is far from popular. In cases arising out of diversity of citizenship, he must see that justice is done between a local citizen, who often has a case with strong emotional appeal, and a non-resident, not infrequently an unpopular foreign corporation. If he confines himself to charging the jury in abstract terms, does nothing to counteract appeals to local prejudice and contents himself with a cowardly passing of responsibility to the jury, the gravest mistakes and the most outrageous miscarriages of justice are easily possible.

With this thought in mind I call your attention to the following provision of H. R. 8892 now pending before the Judiciary Committee of the House and H. R. 4721 which has actually passed the House and is now

*Address delivered at the meeting of the South Carolina Bar Association on February 18—The concluding portion of this address will appear in our April issue.

pending before the Judiciary Committee of the Senate. Both of these bills contain the following provision:

"That, upon the trial of any case, civil or criminal, before a jury, in any district court of continental United States, or in any other Federal court of the continental United States, authorized to try cases with the aid of a jury, the form, manner, and time of giving and granting instructions to the jury shall be governed by the law and practice in the State courts of the state in which such trial may be had, and the judge shall make no comment upon the weight, sufficiency, or credibility of the evidence or any part thereof, or upon the character, appearance, demeanor, or credibility of any witness or party, except as comment is authorized in trial of such cases by the law and practice in the State courts of the State where such trial is had."

It will be noted that this provision of the pending bill does two things, viz.: (1) it requires that the state practice shall control "the form, manner, and time" of instructing the jury in the federal court, and (2) it forbids the federal judge to comment upon the "weight, sufficiency or credibility", of the evidence or the "character, appearance, demeanor or credibility" of any witness or party except as comment is authorized by state practice. By the first requirement Congress nullifies Rule 51 of the rules of practice which after more than two years of intensive study have been adopted by the Supreme Court. By both the requirement and the prohibition the practice of the federal courts since their foundation is radically changed, trial by jury is stripped of one of its most important common law incidents, and the trial judge is deprived of a power of the utmost importance in securing fairness and efficiency in the administration of justice.

Just what does the requirement that state practice be followed mean as a practical matter? It means that in thirty-seven states of the Union the federal trial judge will be forbidden to express an opinion on the facts or to comment upon the evidence. In a large number of them, 28 to be exact, he will be forbidden to charge the jury at all except as to abstract propositions of law embodied in formal written instructions, which can mean little or nothing to the jurors. In all of the thirty-seven he will be without power to counteract the appeals to prejudice and the dragging in of extraneous matters which have done so much to degrade the administration of justice in many state courts. He will thus be made a mere umpire or moderator of a meeting, preserving order and ruling upon the admissibility of testimony, but having little real influence upon the course of the trial. In the state courts, where the contest is generally between citizens of the same community or between the citizens and the local government, such a status on the part of the judge, while not desirable, is measurably tolerable; but in the federal courts, where the contest is almost always between the local citizen and the distant federal government, or between the local citizen and a foreign corporation or a citizen of another state, it is of the utmost importance that the common law power of the judge over the trial be maintained. There is all the difference in the world between the trial of a simple suit on contract or an automobile collision case between citizens of the same community and a suit by a local citizen against a foreign corporation for triple damages under the Sherman Act, or a suit by a disabled soldier against the federal government under the War Risk Insurance Act. To turn cases of this sort over to the decision of a jury with a great mass of expert and technical evidence, without having the judge to explain the bearing of the evidence on the issues but merely read an abstract disquisition on the law, would be to invite decisions based upon error and misunderstanding. And it is worthy of note that it is precisely in the states which have stripped the judge of his power over jury trials, that trial by jury has been the subject of the greatest criticism and there have been the loudest complaints of miscarriages of justice.

Trial by jury, as it existed at the time of the adoption of the Constitution and as guaranteed therein, was not a trial by jury as arbitrators, but a trial by jury in accordance with law, guided and instructed by a judge. The duty of the judge in the jury trial, with the reasons for the existence of this duty, was ably set forth by Judge Hopkinson, more than a hundred years ago, in United States v. Fourteen Packages of Pins, I Gilp. 235, 25 Fed. Cas. (No. 15,151) 1182 at page 1189, as follows:

"That the question of fact should not be taken from the jury by the court, is too clear to be the subject of a discussion; but I hold it to be equally certain, that it is the right and duty of the court to give its aid to the jury in explaining the evidence; in collating its various parts; in drawing their attention to the most material facts in proof and their application to and bearing upon the important points of the case; in ascertaining, between contradictory testimony, which is best entitled to belief; with such comments as will clearly explain to them the views taken by the court of the case. All that is necessary is, that the jury should distinctly and explicitly understand that such observations are to be received by them, merely for the purpose of assisting them in their deliberations, of recalling their recollection to the facts testified, and of turning their attention to the true points of inquiry; but that the decision to be made upon the evidence belongs altogether to them, and that no direction or authoritative instruction is intended to be given concerning them. These doctrines are fully recognized and strongly enforced by Starkie (1 Starkie, Ev. 440). That respectable author says: 'The practice of advising the jury as to the nature, bearing, tendency, and weight of evidence, although it be a duty which, from its very nature, must be, in a great measure, discretionary on the part of the judge, is one which does not yield in importance to the more definite and ordinary one of directing them in matters of law. The trial by jury is a system admirably adapted to the investigation of truth, but, in order to obtain the full benefit to be derived from the united discernment of a jury, it must be admitted to be essential that their attention should be skilfully directed to the points material for their consideration.' After some further remarks, this author adds that, 'jurors unaccustomed, as they usually are, to judicial investigation, require, in complicated cases, all the aid which can be derived from the experience and penetration of the judge, to direct their attention to the essential points, and enable them to arrive at a just conclusion.' Again, after saying that the jury should have 'excluded from their consideration all such evidence as is likely to embarrass, mislead, or prejudice them in the course of the inquiry,' he proceeds: 'Much yet remains to be done of a nature which cannot be defined; *to divest a case of all its legal incumbrances; to resolve a complicated mass of evidence into its most simple elements; to exhibit clearly the connection, bearing, and importance of its distinct and separated parts, and their combined tendency and effect, stripped of every extrinsic and superfluous consideration, which might otherwise embarrass or mislead a jury; and to do this, in a manner suited to the comprehension and understanding of an ordinary jury, is one of the most arduous as well as the most important duties incident to the judicial office.*' In this powerful delineation of what a charge to a jury ought to be, who is not reminded of the clear and luminous order, of the strong and satisfactory discriminations; of the admirable combination of facts and circumstances, with which Judge Washington discharged this 'most arduous as well as most important duty of the judicial office?'

"I have quoted the opinions of this author, which he sustains by authority, thus at large, because I think them

replete with good sense and practical utility; and that it is only by following them that the trial by jury will be attended by the invaluable advantages which belong to it. *It is a solecism to say that a court may set aside the verdict of a jury, if, in the opinion of the court, it be contrary to evidence, and yet that it is an invasion of the right of the jury over the facts, if the court should present their views of the evidence in order to prevent the error instead of correcting it.*" (Italics supplied.)

And I think there can be no question but that the exercise of this judicial function as well as the presence of jurors is guaranteed by the Seventh Amendment. Herron v. Southern Pac. R. Co., 283 U. S. 91, 95; Patton v. United States, 281 U. S. 276, 288; Capital Traction Co. v. Hof, 174 U. S. 1, 13-16; United States v. Philadelphia & R. R. Co., 123 U. S. 113, 114. See also Baltimore & C. Line v. Redman, 295 U. S. 654, 657; Dimick v. Schiedt, 293 U. S. 474, 485-486; Gasoline Products Co. v. Champlin Refining Co., 283 U. S., 494, 497-499. In the Herron case, supra, Chief Justice Hughes, speaking in 1931 for a unanimous court, said:

"In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides. As was said by Mr. Justice Story, in United States v. Battiste, 2 Sumner, 240, 243: 'It is the duty of the Court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the Court.'

"'Trial by jury,' said the court in Capital Traction Co. v. Hof, 174 U. S. 1, 13, 14, 'in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and empanelled, to administer oaths to them and to the constable in charge, and to enter judgment and issue executions on their verdict; but it is a trial by a jury of twelve men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence.'"

And it would seem that Congressional direction as to the manner in which the jury should be charged constitutes legislative invasion of the province of the judiciary. The charge of the Court is the discharge by the judge of "his separate function" and is "neither *practice, pleading,* nor a *form nor mode of* proceeding". Nudd et al. v. Burrows, 91 U. S. 426, 442. In other words, the charge of the Court is the clearest possible example of the exercise of that judicial power which the Constitution vests "in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish". Art. III, Sect. 1. Congress has no more right to regulate the exercise of the judicial function than the Courts or the President have to regulate the exercise of the legislative function.

Aside from these constitutional considerations, it would be most unfortunate for the power of the Courts to charge on the facts to be interfered with. In complicated cases, as I have indicated, it is necessary that the courts exercise the powers in order that the jury may understand the issues involved. In cases involving feeling or prejudice, its exercise is necessary in order that the real issues be kept before the jury so that justice will be done. In all cases, it is desirable that the jury in the performance of their duties have the guidance and direction of the impartial and experienced judge, whose sole interest in the controversy is to see that justice is done and that the jury are not misled by adroit appeals of artful counsel and the injection into the trial of false issues. We trust the judge to find the facts, without a jury, in admiralty cases and in equity cases, where the issues involved are just as important as they are in actions at law. We trust him to set aside the verdict in law cases when in the exercise of his discretion he thinks there has been a miscarriage of justice. And there can be no reason for taking from him the power which enables him to assist the jury at arriving at a correct conclusion so that there will be no miscarriage of justice in the verdict. It should be remembered that the judge is the only disinterested lawyer connected with the trial. He is experienced in weighing evidence and determining issues of fact as well as issues of law. There is no reason why the jury should be deprived of the assistance which he can render them in discharging their duty.

There have been cases, of course, where judges have abused the power of comment, just as they have abused other powers; but these cases afford no justification for destroying this power, which the experience of centuries has demonstrated to be a most valuable safeguard of trial by jury. When the trial judge oversteps the bounds of fair judicial comment and assumes the role of advocate, the appellate court will reverse. See Pullman Co. v. Hall (C. C. A. 4th), 46 Fed. (2d) 399, 404; United States v. Murdock, 290 U. S. 389; Quercia v. United States, 289 U. S. 466, 469-471. In the case last cited the Court said:

"This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses."

In the development of efficient trial procedure, it is of great importance that the power of comment be not impaired. It is important that the discretionary power of the judge in admitting and rejecting evidence be broadened and that the doctrine of harmless error be liberally applied upon appeals. This can safely be done where the power of the judge to comment on the evidence is preserved and the danger of injection of extraneous issues is thus minimized. On the other hand, withdrawal of the power of the judge to comment on the evidence inevitably results in a stricter application of the technical rules of evidence by the trial judge and makes the appellate court less willing to apply the doctrine of harmless error on appeals. This doubtless explains the tendency toward technical decisions on evidence in many jurisdictions where the judge is forbidden to charge on the facts. In such jurisdiction it is difficult to say from the record that the admission of irrelevant testimony may not have prejudiced appellant's cause by the introduction of extraneous issues. The ideal trial atmosphere is one in which any evidence which may throw any light on the issues is liberally received and the danger of such evidence to mislead is minimized by the power of the judge to comment on the evidence and explain its bearing upon the issues.

It is hard to understand why there should be an effort to destroy a power which has existed for so many years and which is so essential to the proper

administration of justice in the federal courts. Doubtless, those who have had little experience in those courts are inclined to attribute to the practice with which they are familiar virtues which it does not possess; for lawyers are prone to think that the practice with which they are familiar embodies the perfection of human wisdom. Others, doubtless, resent the powers exercised in the federal courts by the judge, being unaccustomed to the exercise of such power in the state courts and failing to realize that under the federal system responsibility for the administration of justice rests with him. It does not seem to me to be wise to shift the responsibility. Courts exist to do justice, not to furnish a forum for the display of skill or eloquence; and, if justice is to be done, someone must be charged with responsibility for its administration and given power commensurate with the responsibility.

We have from the very foundation of the federal government clothed the federal judge with full judicial power; and this I think explains in large measure why the administration of justice in those courts has commanded the confidence of the country. We have not, however, until recently done what we should have done to keep the procedure abreast of the times. It is true that the Federal Equity Rules had given the country the simplest and most expeditious practice in equity that it had ever known, that the Admiralty Rules had simplified admiralty practice and that criminal practice had been simplified by a number of statutes and forward-looking decisions, culminating in the Criminal Appeals Rules of four or five years ago, which have practically abolished delays in criminal cases in the federal appellate courts. But in actions at law the courts were fettered by the old conformity act which required them to follow, "as near as may be", the practice of the several states. This was complicated by decisions that the Conformity Act did not apply to the discharge of the "separate function" of the judge, with the result that the federal practice at law was a hybrid practice, full of pitfalls even for a skilled practitioner. The Conformity Act, instead of bringing about real conformity, even in other respects, did precisely the opposite: for in all except about six of the states of the Union the distinction between actions at law and suits in equity had been abolished, and as the Conformity Act did not apply to equity suits, the state practice was followed in law actions and the federal equity practice in equity causes. The result was that whenever a state practitioner came into the federal court, he was required to learn again the distinction between law and equity which he had forgotten in his state practice.

In 1934 Congress authorized the Supreme Court to prescribe by rule the practice in law actions in the federal court and, if it saw fit to do so, to provide one form of action for law and equity. The Supreme Court availed itself of the authority thus granted and has accomplished two much needed reforms at once, i. e., it has abolished, for all practical purposes, the distinctions between law and equity prescribing one procedure for both, and by rules of court it has provided a simple and elastic procedure in which a wayfaring man, though a fool, ought not err. The court has taken its time and has sought the advice of able and forward looking members of the bar and teaching profession. The result is a code of procedure which, in my opinion, is incomparably superior to and much more simple than anything ever achieved heretofore either in this country or in England. It is embraced within less than a hundred pages; and any lawyer of ordinary intelligence can get a comprehensive understanding of it in one afternoon's study. If the federal courts are allowed to put it into effect, my belief is that it will make such a profound impression upon the public that it will be followed as a model by the several states.

The bill to which I have referred, H. R. 8892, re-enacts the provisions of the old Conformity Act and wipes out these rules, over which so much labor has been spent, without so much as giving them a trial. There are some members of our profession who are wedded to their idols, the old forms of practice with which they are personally familiar; there are others, happily few in number, who are willing that progress be impeded because of the advantage which they think that they derive for themselves under the old practice; but this is not true of any large part of the profession. The lawyers of America owe it to themselves, as well as to the country, to see that this vital reform is not wrecked by reactionary efforts of the uninformed or the selfish.

And the bill would do a third thing which has been frequently attempted but which so far has not been accomplished. It would limit the jurisdiction of the lower federal courts based on diversity of citizenship. The act provides:

> "The capacity of an individual, other than one acting in a representative capacity to sue or be sued in the district courts of the United States of America, shall be determined by the law of his domicile, and, for the purpose of determining citizenship under this section, a corporation shall be deemed to be a citizen of the State in which it is sued, if the cause of action arose within said State, and if such corporation is authorized to do and is doing business therein, irrespective of the State of its incorporation."

While doubt may be entertained as to the constitutionality of this provision, I am not at all certain that such doubt is well founded. The jurisdiction of the lower federal courts rests upon the legislation of Congress. As said by Mr. Justice Sutherland in Kline v. Burke Construction Company, 260 U. S. 226, 234: "The Constitution simply gives to the inferior courts the capacity to take jurisdiction in the enumerated cases, but it requires an act of Congress to confer it. . . And the jurisdiction having been conferred may, at the will of Congress, be taken away in whole or in part". It is idle to minimize the effect of the provision by attempting to persuade ourselves that it will apply to only a small class of corporations. As a practical matter it will practically bar insurance companies, finance corporations, railroad companies and other corporations doing business across state lines from resorting to the federal courts and will destroy diversity of citizenship in the class of cases in which it is of the greatest importance. Let us look then to the basis of that jurisdiction.

While the arguments adduced in support of this jurisdiction are ordinarily arguments of convenience, the jurisdiction itself rests upon necessity in view of the dual nature of our government and has existed from the beginning, being contained in the Judiciary Act of 1789. No power exercised under the Constitution has, in my judgment, had greater influence in welding these United States into a single nation; nothing has done more to foster interstate commerce and communication and the uninterrupted flow of capital for investment into the various parts of the Union; and nothing has been so potent in sustaining the public credit and sanctity of private contracts. Interstate commerce has grown to an extent that the framers of the Constitution could not have foreseen; interstate travel and communication have increased; and the flow

of capital for investment across state lines has become an essential part of our national existence. And while it is true that these things have doubtless ameliorated local prejudices to some extent, they have also greatly increased the number and importance of the controversies between citizens of different states; and have rendered it a matter of prime importance that controversies affecting citizens of different sections shall be decided by tribunals of a national rather than a local character—courts which represent the people of all sections and which for that reason will command the confidence of the people of all sections. When life everywhere is expanding and becoming national in scope, it is no time to make the administration of justice a local matter.

One of the principal arguments in favor of jurisdiction based on diversity of citizenship is that its existence is essential to furnish the non-resident an impartial tribunal in which his controversy may be tried. This argument is as valid today as it was in 1787. I do not assert, I do not believe, that federal judges are men of higher character than state judges or that jurors in federal courts are more intelligent or more impartial as a general proposition. But there is this difference: the state trial judge is generally a local man with a local outlook. The federal trial judge has jurisdiction over a wide territory; he is part of a national judicial system and his action is subject to review as of right by a court having jurisdiction over a number of states. The jury in the state court comes from the county of the resident party: the federal jury is drawn from a wide territory and usually knows no more about the plaintiff and his attorney than about the defendant and his attorney. The question involved is not one upon which statistics of any value may be obtained. It is one which must be decided by men of experience in the light of the known facts of human nature. And no statistics are necessary to convince any lawyer of experience representing a non-resident client, that he will obtain a more impartial tribunal for his client under the conditions afforded by the federal courts than under those afforded by the courts of the state. You need only ask yourselves this: if one of you gentlemen were defending a citizen or corporation of South Carolina sued in a rural county in the state of Kentucky or New York, would you prefer to try your case before the local county judge and before a jury composed of the fellow countymen of the plaintiff, or in the federal court where the judge has jurisdiction over half the state and where the jurors are drawn from a number of counties? There is but one answer to that; and you can rest assured that citizens of Kentucky or New York feel the same way about going into local courts in South Carolina or North Carolina that we feel about going into local courts in their states.

I have spoken of the importance in the federal courts of the power of the judge to control and direct the course of the trial, and have called your attention to the large number of states in which the judge has no such power under the state practice. In some, as I have said, the judge has been forbidden to charge upon the facts or to charge at all except in the form of written instructions embodying abstract propositions of law. In some he is forbidden to direct a verdict. To require a non-resident to try his case in such a tribunal is not only to turn him over to the tender mercies of a local jury without power in the presiding judge to counteract the appeals to prejudice of local counsel, it is also to deny him the kind of trial by jury which under the Constitution he has the right to expect. Opponents of the jurisdiction based on diversity of citizenship say that when the jurisdiction in the lower federal courts is withdrawn by Congress, the state courts will exercise the jurisdiction which Congress has the power to vest in the federal courts under the diversity of citizenship clause and will to that extent carry the burden of the federal jurisdiction. This is true; but the trouble is that Congress is without power to regulate procedure in the state courts.

Almost as important as either of the foregoing considerations is the fact that the abolition of the diversity of citizenship jurisdiction will tend to destroy the uniformity of decision throughout the United States in matters of general law which, beginning with Swift v. Tyson, 16 Peters 1, has gradually been built up through the years. The doctrine is now well established that in matters of general law such as contracts, agency, negotiable instruments, insurance, negligence, torts, etc., the courts of the United States will follow their own decisions and not those of the several states. The result of this has been the creation of a great body of decisions of the federal courts upon the basis of which a lawyer can advise his client with assurance as to his rights. Destroy the jurisdiction based on diversity of citizenship and this uniformity of decision is destroyed. There is no movement in this country more important, I think, than that looking toward unification of the law. The American Law Institute and the Committee on Uniform State Laws of the American Bar Association and of the various local associations are all working to that end. For years the federal courts have been a powerful influence toward uniformity; but the destruction of their jurisdiction based on diversity of citizenship will greatly impair their usefulness in this field.

It seems to me, therefore, that upon these practical considerations—the guaranty of an impartial tribunal, the securing of a dependable procedure, and the preservation of a uniform body of law for application between citizens of different states in those branches of the law where uniformity is most important—the jurisdiction based on diversity of citizenship should be preserved; but there is an argument based on principle which appeals to my mind more powerfully than any of these. When a citizen of the United States must go into a court in the United States to assert or defend his rights, he ought to have the right to go into a court which is as much his court as it is the court of his adversary. The judicial settlement of disputes appertains to the sovereign; and when I go into court I wish it to be my sovereign that exercises sovereign power. The federal court represents all of the people of the United States; and if I go into a federal court in New York, it is as much my court as it is the court of a citizen of that state. The judge is appointed by my President, is confirmed by my senate and is subject to have his actions called in question by the senators and representatives whom I vote for as well as by the senators and representatives who represent my adversary. If I go into a state court in New York, however, I am in a court which represents a sovereignty upon which I have no claim. The judge represents the people of New York, he does not represent me or the people of the state from which I come. Citizenship in the United States is both local and national. For matters involving the local citizenship the local courts are provided. For matters which involve citizens of different states, only the federal courts can furnish to both a tribunal of the sovereignty to which

both owe allegiance and to which both look for protection.

The arguments made in favor of destroying this jurisdiction are patently fallacious. It is said that to destroy it will relieve the pressure on the federal courts. One of the first duties of government, however, is to provide tribunals for administering justice to its citizens; and, if I am correct in thinking that a citizen is entitled to have his disputes adjudicated in a tribunal of the sovereignty to which he owes allegiance, it is unthinkable that that sovereignty should shirk its responsibility and abdicate its proper functions because of a comparatively insignificant matter of expense. Congestion should be relieved, if this is necessary, by creating additional courts, not by abandoning a historic jurisdiction of fundamental importance.

It is said that trial in the federal courts is expensive and that the poor litigant should not be put to this expense. So far as court costs are concerned, they are not onerous and I think will be found little if any higher than the costs in the state courts of most of the states. The federal statutes provide, moreover, that the poor litigant in all federal courts, from the lowest to the highest, may prosecute or defend cases without prepayment of costs or the giving of security. Attending court in a city other than that of his residence may have worked some hardship upon a litigant in the early days of the Republic; but now that federal courts are held in almost every city or town of importance in the country and are readily accessible by reason of the good road and the automobile, there is no longer any hardship here worthy of consideration.

It is argued that the jurisdiction works unfairly in that it gives the non-resident a choice of jurisdictions. This, however, is not due to the jurisdictional provision, but to the removal statute. A resident may sue a non-resident in a federal court if he desires. It is only where he is sued in a state court in the state of his residence that he may not remove. There would seem to be nothing objectionable in this; for in such case he is sued in the court of a state of which he is a citizen and, if the non-resident has no objection to that jurisdiction, he should have none. If, however, this is thought to be a discrimination against him, the proper remedy is not to destroy an important jurisdiction of the federal court, but to amend the removal statute so as to give him the right to remove if he desires. So far as giving a choice of tribunals to the non-resident defendant is concerned, the choice amounts to no more than the assertion of the right on his part to be tried in a court of the sovereign power to which he owes allegiance rather than in the court of the state of his adversary, which is to him a foreign state in fact and in law.

I see no valid reason for the destruction of this ancient jurisdiction of the federal courts. I see the strongest reasons against its destruction, in addition to those based upon constitutional theory and judicial efficiency already advanced. We in America are engaged in the building of a great nation. If we are to be successful we must cultivate a national outlook and we must see that there is the freest communication and intercourse, with unrestricted flow of capital and commerce into the various parts of the Union. Our country comprises a wide expanse of territory with a varied people with widely differing customs and ideals. We will develop commerce in the several states and will facilitate the flow of capital to sections where it is needed only if we maintain the confidence of investors that when they invest their moneys in distant states or in enterprises serving those states, their rights will be protected by the power of the government of which they are citizens and in which they have confidence. No man in the recent history of our country had a wider knowledge of our national problems or a profounder understanding of our national philosophy than Chief Justice Taft. As Circuit Judge, Secretary of War, President and finally Chief Justice, he knew the country as probably no other American of this generation. Speaking on this subject before the American Bar Association in 1922, he said:

"The theory is advanced that a citizen of one state now encounters no prejudice in the trial of cases in the state courts of another state, and that the constitutional ground for the diverse citizenship of federal courts has ceased to operate. If the time has come to cut down the subject matter of federal judicial jurisdiction, it simplifies much the question of the burden of work in the federal courts, but that has not been the tendency of late years. I venture to think that there may be a strong dissent from the view that danger of local prejudice in state courts against non-residents is at an end. Litigants from the eastern part of the country who are expected to invest their capital in the West or South will hardly concede the proposition that their interests as creditors will be as sure of impartial judicial consideration in a Western or Southern state court as in a federal court. The material question is not so much whether the justice administered is actually impartial and fair, as it is whether it is thought to be so by those who are considering the wisdom of investing their capital in states where that capital is needed for the promotion of enterprises and industrial and commercial progress. No single element—and I want to emphasize this because I don't think it is always thought of—no single element in our governmental system has done so much to secure capital for the legitimate development of enterprises throughout the West and South as the existence of federal courts there, with a jurisdiction to hear diverse citizenship cases."

The particular attack embodied in the bill here in question is the outgrowth of the decision in the Black and White Taxicab case, 276 U. S. 518, where a local corporation was dissolved and a charter obtained from an adjoining state so that a local group might invoke the federal jurisdiction in a case local in character. But the trouble with the proposal is that it goes entirely too far. I can see that what are essentially local corporations representing local citizens ought not be allowed to invoke the federal jurisdiction because they have obtained a charter from another state. But the remedy for this is some such provision as that a corporation shall be deemed a citizen of the state where it has its principal place of business; not to deny the federal jurisdiction to all foreign corporations simply because they are doing business within the state.

(To be concluded in the April issue.)

Federal Taxation

(*Continued from page* 196)

either point, but there are some considerations, generally overlooked, which I should like to emphasize.

In the first place, it is perfectly evident that unless there is an undistributed profits tax, the Treasury stands to gain more revenue if corporate earnings are distributed than if they are retained. If they are retained, the Treasury secures the corporation normal tax and no more for the present. If the earnings are distributed, the Treasury receives not only the corporation normal tax, but also the taxes payable thereon by the individual and corporate shareholders. Consequently, the Congress may reasonably impose a somewhat higher rate of tax upon corporate earnings which are retained than upon corporate earnings which are distributed. This reasoning applies equally well whether or not the retained earnings are invested in improvements to the plant or in the payment of debts. Deductions on these accounts are not allowed to individuals or partnerships, for the reason that they do not directly affect the net operating income of the business which is the subject of the tax.

In the second place, with the corporate normal tax reaching a maximum of 15 per cent, while individual surtaxes reach a maximum of 75 per cent, there is every tax incentive for the retention of earnings by corporations, in the absence of some form of tax upon retained earnings. Unless the Congress wishes to adopt the policy of encouraging corporations to retain earnings rather than to distribute them, it is reasonable to impose some form of undistributed profits tax. The reasons for such a tax become particularly strong in the cases of those closely held corporations with large incomes, which distribute a less percentage of their earnings than is the normal corporate practice.

On the other hand, if corporation taxes can be regarded as essentially a charge against earnings which would otherwise be paid to common stockholders, it is reasonable to give those stockholders a tax credit in respect of dividends paid, against their own normal taxes.

Finally, the corporation tax system is complicated with a capital stock tax[71] which is not a tax upon the actual value of the capital invested in the business; and by an excess profits tax[72] which is not a tax upon excess profits. Neither of the taxes has much to recommend it save the amount of revenue which it produces. One may hazard a guess that the corporation taxes will ultimately be simplified and that there will be a further integration of the rates and types of taxes imposed upon corporations with those imposed upon individuals.

4. The method of taxation of capital gains and of the deduction of capital losses is a perennially unsettled problem. The Treasury has consistently taken the view that there is no satisfactory reason for exempting capital gains from the income tax,[73] and as a result, imposing an additional burden upon earned incomes and incomes from dividends, interest, and the like. During the diverse conditions of the past 10 years, income taxes on capital gains have produced over $1,400,000,000, in excess of allowable deductions and tax credits for losses, an amount not lightly to be brushed aside by a repeal, or shifted to another set of taxpayers. Nevertheless, none of the methods heretofore utilized in taxing capital gains is wholly acceptable, from the point of view of tax equity. Moreover, all of them are open to the charge of having encouraged transactions to be consummated at particular times for tax purposes, which transactions would otherwise never have been made at all or would not have been made at the particular time. We hope that the method of taxing capital gains can be considerably improved by working out a practical plan whereby the total tax on the gain will approximate the total taxes which would have been due had the gains been realized equally over the period during which the property was held. Finally, if capital gains are to be taxed, in fairness, adequate provision must be made for the deduction of capital losses.

5. Everyone recognizes that an approach should be made toward the integration of the Federal and State taxing systems, and toward the elimination of the present overlapping of the particular forms of taxes. The real problem is the formulation of an effective plan of procedure. Should the Congress attempt to impose its will upon State tax administrations by providing for a distribution of the proceeds of certain taxes to the States, if the States will repeal their present taxes upon the same subjects? A considerable change in our whole philosophy of government is inherent in this proposal. Should we, therefore, proceed on the more moderate course of allowing credits against the Federal tax for the amount of a like State tax paid by its citizens? This proposal, unfortunately, does not eliminate duplicate administration and duplicate litigation. Can we meet this last problem by some provision for joint returns, or for duplicate returns to the State and Federal Governments? These are major problems which can hardly be settled, either by the States or the Federal Government, acting alone. Perhaps the best mode of procedure would be the designation of some responsible commission with a national standing to spend a year in a thoroughgoing study of possible alternatives and then to propose an acceptable program.

The next 25 years will doubtless see as significant developments in the income tax as the past 25 have witnessed. There can be few subjects, if there are any, which require greater technical competence, for not only is tax law a twisted and thorny growth, but its roots are deeply imbedded in constitutional law and in conflicts of law, in corporation finance and in trusts. There are few subjects whose impact upon individual citizens, businesses, and the general economic and social structure is so potent and so far-reaching. One cannot study taxation in its broader aspects for many years without observing the inadequacy of any one type of professional training to meet the requirements of private clients, and more particularly of public service. There are few legal subjects which are linked so closely with other sciences, such as economics, accounting, and business. The intelligent tax lawyer knows and uses something beyond the 17,000 decisions to which I have referred. Yet the tax law is after all the end product of all these other professional skills; and thus it is the lawyer who has the chief responsibility for the development of a wise national tax policy. The interaction of the Supreme Court and the Congress, stimulated by the lawyers and their cases, has vastly improved the income tax of 25 years ago. The future is, likewise, largely in their hands and in ours.

71. Revenue Act of 1935 sec. 105 (49 Stat 1014, 1017) as amended by Revenue Act of 1936, sec. 401 (Id. at 1733).

72. Revenue Act of 1935, sec. 106 (Id. at 1019) as amended by Revenue Act of 1936, sec. 402 (Id. at 1733).

73. See, for example, Statement of the Acting Secretary of the Treasury, Hearings before the Committee on Ways and Means, 73rd Congress, 2nd Session, 1934, p. 38.

The House of Law in a Time of Change

(*Continued from page 208*)

does it now suffice, or must we in turn add to it fresh aims drawn, as the previous generations drew theirs, from the demands of the public on men of the legal order? The public interest called first for lawyers who were masters of their craft. That need was answered, and as soon as it was answered the call came for lawyers who were not only master-craftsmen but reformers and perfecters of the administration of justice. Doesn't the public interest now call for lawyers who are all these things and who are statesmen besides? Statesmen in the sense that they will bring to bear on public affairs the same forbearance and understanding, the same devotion to the equitable adjustment of conflicts, and the same passion for facts, which they bring to bear on private affairs. But why more so now than ever before? And why more so than other citizens? Because, in all the western world, with an accelerated pace whose end is not in sight, the solution of the difficulties precipitated by the industrial revolution and aggravated by war is being sought through legislation and administrative processes. And the success of both will depend largely on the attitude of the legal order.

We may approach legislation in two ways. We may regard it as the work of ignorant men swayed by prejudice and pressure, to be opposed almost as a matter of course and to be challenged as unconstitutional whenever there seems to be a straw to lean upon. Or we may accept its inevitability; try patiently, and with faith in the ultimate sense of the average man, to understand its causes and objectives; and pool our special skill and knowledge in efforts to make it as scientific, fair and practical as possible.

We may approach the administrative process in similar ways. We may decry the growth of administrative tribunals as the selfish reaching out of inexperienced bureaucrats for power, or we may accept them as unavoidable outgrowths of a changing world, study their problems with an open mind, and join in constructive efforts to make this latest development of the legal mechanism as efficient and just as possible.

New forms of legislation and of administrative activity have raised constitutional issues of the gravest sort, and these also we may approach in two ways. We may approach them emotionally and uncritically, invoking the tribal gods to taboo each fumbling step which democracy takes. Or we may approach them objectively, alert to point out clear violations of the spirit and letter of our charter, but ready also to consider without passion and without alarm where the limits on government should be defined and how policed in a world for which the original charter was never designed.

The one approach is negative, resistant, and above all fearful of men's ability to govern themselves in large undertakings. The other is positive, tolerant, more confident of the final success of democratic methods. For each an intellectual case may be made; each embraces men of honesty and goodwill as well as zealots and bigots. Intellectually the division turns, as every such question finally turns, on an estimate of human nature and capacity, about which it is useless to argue.

We can't avoid taking one approach or the other; we wouldn't be worthy of our salt if the deepest issues of our time in the field of law left us unresponsive and indifferent. Whichever approach we take, it will have momentous consequences for the future of legal education and therefore for the future of the bar.

If, as I for one hope and believe, most of us will take the second approach, we shall have to face both a personal and an educational question. The personal question is the same as that which our predecessors faced, though it comes to us more heavily charged with perplexities. They wished to aid in reforming the administration of justice, and the question was whether they could engage in the multiform activities which that task required and still carry on the scholarly work which their fathers began and without which no system of law can flourish. In the end they responded to the needs of their day without counting the possible cost to scholarship; and their scholarship survived. We have to ask ourselves whether our scholarship too will survive if we not only carry on the activities which they began but, in addition, throw ourselves into the work of helping to solve the legislative, administrative and constitutional difficulties of our age.

We shall be called upon for more committee work, more labor of draftsmanship, more assistance to governmental agencies, state and federal, more fact-finding, than ever before. We shall be drawn to respond as our predecessors responded. In this there is some risk that our most essential function of study, reflection and writing in fields of less immediate current interest but of equal or greater ultimate importance, will suffer seriously. But if we are conscious of that risk, and if each will decide in what direction his own talents can most usefully be applied, without fear of withdrawing from the crowd when his inner promptings so urge him, I think we shall be able to perform both tasks successfully. Nor should we forget that facts which may seem of only immediate significance, and which are gathered painfully at the sacrifice of supposedly profounder studies, may sometimes turn out to be straws from which the later bricks of creative generalization will be made.

If the pull of the times presents us with these difficult personal questions, it presents us also with educational questions. If we take as our ideal that men of the legal order should, in addition to their other qualifications, be statesmen in the broadest sense; if we wish to be, and wish our students in their turn to be, such men: the very existence of that attitude, without one spoken word of exhortation, will have more educational effect than all the courses, methods or techniques that anyone can devise. And yet in the nature of things the ideal of a given generation of teachers tends always to translate itself into modifications of courses, methods and techniques. This phenomenon expresses our faith in the importance of educational procedure: a faith which, if exaggerated, is worth keeping for the zest it brings to our calling. And now already, in the attempts which are under way to weave together the law and the social sciences, and in the reshaping and expansion of the public law courses, we perceive the working out of that phenomenon. We are trying to give our students a truer picture of the totality of problems which

legal statesmanship must grapple with. In this most arduous of undertakings we are perhaps on the threshold of advances as important as any made by our ancestors.

Without minimizing their importance, I venture to suggest a further possible line of advance. That is to make some provision for apprenticeship training. I should like to see a concerted effort to induce the federal and state governments to take in qualified young law graduates, for periods of not to exceed two years, as apprentices in the legal work of the various commissions, boards, departments, and (where they exist) legislative drafting bureaus; paying them enough to live on; and letting them go, save in exceptional cases, when their apprenticeship was up, in order to make way for fresh entrants. I'd like to see a constant stream of young law-trained men passing through these governmental agencies and learning by first-hand experience something of their problems, objectives, difficulties and shortcomings. Such experience would not only be valuable in later practice but would give to at least a portion of the bar a direct acquaintance with forces and processes which most lawyers now regard with instinctive aversion and distrust but which, if they could see them face to face, might present a wholly different aspect.

I think that this could all be done at little if any additional cost, for the eagerness of young law graduates to get a taste of governmental experience is now such that most of them would be willing to serve at least a year or two for very much less salary than is generally offered. And I know that they would be of use even for such short periods, for, if I may mention my own school again, our candidates for a doctor's degree, who rotate for two or three months at a clip in part-time apprenticeship work for the Attorney General, the Public Service Commission, the Industrial Commission, the Income and Inheritance Tax departments and occasionally other boards or agencies, have demonstrated that young law-trained men without practical experience can be of positive help though serving for extremely short terms. They catch on very quickly, in a week or so, despite doubts to the contrary which were expressed when the plan was first proposed.

If apprenticeship positions could be created on any sort of a scale, they might be connected up with scholarships along the lines provided for last year by the Wisconsin legislature. Under that plan the state advances to needy and promising students in their last year in the university a sum sufficient to relieve them from the pressure of outside work, in consideration of their agreeing to take a suitable position in the government after graduation, for not exceeding two years; the advances to be paid off by deductions from their salaries. This plan is just getting under way, but it seems to be a promising attempt to link together the need of the state for able young brains, and the need of the latter for a chance at a decent education, which economic pressure now so frequently denies them.

Current Events

(*Continued from page* 185)

Its personnel will include attorneys from the office of the Chief Counsel of the Bureau, who will not only assist in the review of contested cases but will represent the Commissioner in the trial at Los Angeles of any cases which may finally be appealed to the Board of Tax Appeals.

As heretofore, the Revenue Agents will examine returns and discuss their reports with the taxpayers. However, if the agents' findings are finally protested by the taxpayers, the case will no longer be sent to Washington for review and conference in the Bureau, but will be referred to the Los Angeles Division of the Technical Staff. The Division will grant a hearing to the taxpayer, consider the case in the light of his contentions, and make a final determination of his tax liability. The Technical Staff Division will have full authority to revise or reverse the findings of the Revenue Agent in Charge, and its decisions will be final in so far as the Bureau of Internal Revenue and the Treasury Department are concerned. If the taxpayer is not satisfied with the determination of his case by the Staff, his only recourse will be an appeal to the Board of Tax Appeals.

It is thought this arrangement will eliminate many repetitious steps and protracted delays which have seemed impossible to avoid under the present plan of centralized consideration and settlement of tax disputes in the Bureau at Washington. It will permit prompt action on all contested cases, at a point near to the taxpayer and to the sources of evidence regarding his transactions. This new set up is expected to provide, even for the small taxpayer, an able and impartial administrative body to which he can have ready recourse should he be dissatisfied with the findings of the agency which examined his return in the first instance. The Treasury Department believes, further, that it will result in fairer treatment and greater convenience to taxpayers, in quicker administrative decisions, and in fewer appeals from the Bureau to the Board of Tax Appeals and the Courts.

The Secretary says, "We intend to make a thorough, practical test at Los Angeles, along these lines, of the principle of decentralization as applied to income-tax administration. If our plan proves to be sound in actual day to day operations, we will extend it as soon as we can to the whole Pacific Coast area, and gradually, as time goes on, to the rest of the country." Mr. Morgenthau thus summarizes the new plan: "Our intention is to provide one, single, unified agency to exercise on the ground, for the Commissioner, all the authority which the Department, or any of its branches, may have under the law, in the review of protested income-tax determinations made by the revenue agents, in the settlement of contested cases, and in the defense of such cases, when necessary, before the Board of Tax Appeals."

This newest Los Angeles tryout of decentralization differs from the plan previously established in Cleveland, Dallas, and San Francisco in that it carries to the field the work of the Technical Staff and also the making of the Bureau's final determination by an independent group; whereas, in the other

cities mentioned, the plan has been that the office of the Internal Revenue Agent in Charge, in addition to its own functions, should act as a representative of the Income Tax Unit.

Both the above procedures are, of course, different from the Bureau's routine business for which there are 38 Revenue Agents in Charge in various cities throughout the country and 28 Technical Staff representations. The Chief Counsel of the Bureau has representatives in 9 cities outside of Washington.

Preliminary Report of Committee on Judicial Salaries

THE purpose of this Committee must not be misunderstood! It is not charged with the duty of simply obtaining additional dollars for the judiciary; it was created and is now functioning on the theory that there is no more vital public activity than the administration of justice and the surest way to obtain the best judges is to so compensate them as to attract the best possible incumbents. These principles are the guides under which this Committee operates. Please note that there is no member of the judiciary on this Committee.

The subject of judicial compensation, that is, salary, retirement pensions, etc., is necessarily a legislative matter. Even though this is a non-legislative year in the sense that only a few states hold regular sessions in 1938, still the broad topic of proper remuneration for those who preside in our courts is receiving careful study.

In some states consideration is being given to an increase in the salaries paid by the state. In others a survey is under way as to the advisability of permitting individual counties to add to the state pay or to raise the amount now being so paid and thus reach an adjustment much needed because of local conditions. In other states attention is focused upon pension plans; elsewhere thought is centered upon the possibility of providing research assistants for members of the highest court.

The achievement of such goals seldom comes spontaneously. Much spadework must usually be done and it is this portion of a very large program which is now in process. Only occasionally will a short, snappy campaign bring about an amendment of an existing statute on this subject. The need for such an amendment must be spread throughout the state in a convincing manner so that it may receive support from all sections. Each state has its own problems.

A study of the tables presented in our last annual report at Kansas City will disclose the comparative position of the reader's own state.

Now is not the time to comment on activity in any particular state, but it may be comforting to those who are interested in the general topic of judicial compensation to be assured that even in this non-legislative year several jurisdictions are well under way.

WALTER S. FOSTER, Chairman.

New Legal Institutes Started

FURTHER progress in its program of advanced legal education is announced by the Section of Legal Education and Admissions to the Bar. The Dallas Bar Association will hold an institute on April 6, 7 and 8, at which Professor Walter Barton Leach of the Harvard Law School will speak on "Certain Phases of the Law of Real Property and the Drafting and Litigation of Wills." On the same days, Professor Austin W. Scott of Harvard will be the speaker at an institute held in Kansas City under the joint auspices of The Lawyers Club of Kansas City and the Kansas City Bar Association. His subject will be "Recent Developments in the Law of Trusts."

A favorable report has been made by a committee of the St. Louis Bar Association, and it is anticipated that plans for an institute in that city will be announced shortly. A committee of the Denver Bar Association is reporting to a meeting in March concerning this subject. In Columbus, Ohio, a committee appointed to consider the holding of a law institute passed around a questionnaire to those attending a Columbus Bar Association luncheon, the result being a unanimous vote in favor of holding such a series of lectures in Columbus. "Problems on Certain Phases of the Law of Real Property and the Drafting and Litigation of Wills," "Problems in the Modern Law of Contracts of Interest to the Practicing Lawyer," "Developments in the Law of Equity," and "New Problems in Federal Taxation," were indicated as the most popular subjects.

Mr. J. C. Macfarland, chairman of the Los Angeles Bar Association committee on practicing law courses, sends word that there has been great enthusiasm and widespread interest in the initial lectures which have already been held in Los Angeles. The general or practical course of fifteen lectures, designed primarily for younger lawyers, has attracted a registration of two hundred and fifty. A fee of $5 is charged for this course to members of the Los Angeles Bar Association and $10 to others. The specialized course, consisting of four series of four lectures each devoted to particular topics, has a registration of one hundred and sixty lawyers. The price for the four series of lectures is the same as that for the general series. Any sums of money received by the Los Angeles Bar Association over and above the cost of these lectures will be earmarked for future educational work.

Nominating Petition Withdrawn

Mr. Ernest A. Green, of St. Louis, Missouri, whose nominating petition for State Delegate was printed in the February issue of the Journal, has written to Hon. Edward T. Fairchild, Chairman of the Board of Elections, asking that the petition be withdrawn. He gives the following reasons:

"I have just been advised that subsequent to the receipt of my nominating petition, another petition was filed nominating Judge Laurence M. Hyde of Jefferson City for the same honor. I have known Judge Hyde for many years and he is a personal friend of mine. There is no desire on my part of entering into a contest for this place. In fact, it is my judgment that the interests of the Association are better served without a contest in this State at this time. Furthermore, I have been informed that the supporters of Judge Hyde are of the opinion that since the office of Member of the Council has heretofore rotated every three years between St. Louis and Kansas City, the person elected as a State Delegate now should come from outside either of the metropolitan cities of this State. Certainly the interests of the American Bar Association are not advanced by a contest which arrays the large cities against the remainder of the State."

New Service to Members

As part of its program for increased service the American Bar Association has made arrangements to furnish to its members copies of Opinions of the Supreme Court, at a cost of $1.00 for each opinion. Copies of opinions will be sent by air mail within twenty-four hours after the opinion is handed down, which means that they should be received anywhere in the United States on the second day. Requests for opinions may be made prior to the time the decision is announced. All requests should be addressed to the American Bar Association, 1152 National Press Building, Washington, D. C., and should be accompanied by a check payable to the order of the Association for $1.00 for each opinion requested. If it is desired that the opinion be sent special delivery, 10c should be added to the remittance.

ANNOUNCEMENT OF THE BOARD OF ELECTIONS

Ballots for the 1938 election of State Delegates will be mailed to all members of the American Bar Association between March 12 and 19, 1938. Ballots to be counted must be received by the Board of Elections at the headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago, Illinois, on or before April 22, 1938.

In addition to the election of State Delegates for each jurisdiction, vacancies existing in the office of State Delegates in Hawaii, Kansas, Kentucky and New Hampshire are to be filled.

EDWARD T. FAIRCHILD,
Chairman, Board of Elections.

Nominating Petitions for State Delegates

ARIZONA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Jubal Early Craig, of Phoenix, Arizona, for the office of State Delegate for and from the State of Arizona, to be elected in 1938:

C. B. Wilson and Chas. B. Wilson, Jr., of Flagstaff; Kirby L. Vidrine, R. C. Stanford, Jr., W. Francis Wilson, Charles Bernstein, Richard Fennemore, A. Y. Moore, Elias M. Romley, J. J. Cox, Arthur M. Davis, Henry H. Miller, Harold L. Divelbess, Walter J. Thalheimer, Fred W. Rosenfeld, Norman S. Hull, Ivan Robinette, E. G. Frazier, Lin H. Orme, Eli Gorodezky, Walter E. Craig, Virgil T. Bledsoe, James R. Moore and Arthur L. Goodmon, of Phoenix; T. J. Byrne, A. H. Favour, John R. Franks, J. H. Morgan, W. E. Patterson, John A. McGuire and Alfred B. Carr of Prescott; B. G. Thompson, Gerald Jones, Archie R. Conner, Frederic G. Nave, Ralph W. Bilby, Edward W. Scruggs, Cleon T. Knapp and Jas. P. Boyle, of Tucson.

CALIFORNIA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Guy Richards Crump, of Los Angeles, California, for the office of State Delegate for and from the State of California to be elected in 1938:

Charles A. Beardsley, William H. Donahue, Everett J. Brown, T. P. Wittschen, A. T. Shine, Earl Warren and Frank S. Richards, of Oakland;

Jefferson P. Chandler, Louis W. Myers, J. P. Wood, John W. Hart, Arnold Praeger, Norman A. Bailie, Gurney E. Newlin, Norman S. Sterry, Frank B. Belcher, Earle M. Daniels, Rex Hardy, Edward D. Lyman and Lowell Matthay, of Los Angeles;

O. K. Cushing, Warren Olney, Jr., A. W. Brouillet, Garrett W. McEnerney and John H. Riordan, of San Francisco; Archibald B. Tinning, of Martinez.

CONNECTICUT

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Joseph F. Berry, of Hartford, Connecticut, for the office of State Delegate for and from the State of Connecticut, to be elected in 1938:

Lucius F. Robinson, Alex W. Creedon, Charles Welles Gross, Henry J. Marks, J. Harold Williams, Willis G. Parsons, Spencer Gross, Edward M. Day, Louis M. Schatz, Joseph P. Cooney, James W. Carpenter, Ralph O. Wells, William S. Locke, John B. Lee, Roger Wolcott Davis, Julius G. Day, Jr., Allan K. Smith, Olcott D. Smith, Raymond H. Dragat, Lucius F. Robinson, Jr., Pomeroy Day, Howard W. Alcorn, Henry P. Bakewell and Hugh Meade Alcorn, Jr., of Hartford;

Warren B. Burrows, of Poquonock Bridge; Wallace W. Brown and Harold E. Mitchell, of West Hartford; James E. Wheeler, Frank S. Bergin, Frederick H. Wiggin and J. Dwight Dana, of New Haven; David S. Day, of Bridgeport; T. F. Carmody, William E. Thomas, William J. Larkin, Jr., John D. Thoms and Edward T. Carmody, of Waterbury; Hugh M. Alcorn, Suffield.

DISTRICT OF COLUMBIA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Frank F. Nesbit, of Washington, D. C., for the office of State Delegate for and from the District of Columbia, to be elected in 1938:

Paul F. Hannah, John H. Pratt, Frederick A. Ballard, Henry Ravenel, John A. Selby, Lawrence A. Baker, James C. Wilkes, Jerome F. Barnard, Philip F. Herrick, Gerald I. Oxenburg, Bolitha J. Laws, John W. Townsend, Justin L. Edgerton, Joseph A. Kaufman, James Oliver Murdock, R. Aubrey Bogley, John E. Larson, G. Bowdoin Craighill, Leo N. McGuire, George Monk, William P. Smith, C. F. R. Ogilby, Philip Goldstein, John J. Carmody, Samuel A. Syme, Joseph C. McGarraghy, David A. Pine, F. W. Hill, Jr., B. Woodruff Weaver, Charles S. Baker, Robert F. Cogswell, Frederick Stohlman, Paul B. Cromelin, Charles E. Pledger, Paul E. Shorb, Dwight Taylor, Wm. Merrick Parker, James F. Reilly, Henry I. Quinn, Frank J. Hogan, Walter M. Bastian, Austin F. Canfield, Joseph A. Burkart, Edmund M. Toland, Wm. E. Richardson, Morris Simon, Lawrence Koenigsberger, Bernard I. Nordlinger, H. Winship Wheatley, H. Winship Wheatey, Jr., D. M. Patrick, Jos. J. Cotter, Nelson T. Hartson, Wm. H. Donovan, Arthur J. Phelan, Edmund L. Jones, John W. Guider, Lester Cohen, Lowry N. Coe, Marcus Borchardt and Milton W. King, of Washington, D. C.

FLORIDA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Giles J. Patterson, of Jacksonville, for the office of State Delegate for and from the State of Florida, to be elected in 1938:

George C. Bedell, Scott M. Loftin, Russell L. Frink, Chester Bedell, Walter F. Rogers, Reuben Ragland, Fred B. Noble, E. J. L'Engle, E. M. McCarthy, Jr., J. Henry Taylor, Donald K. Carroll, Henry P. Adair, F. P. Fleming, Lee Guest, Sam R. Marks, Olin E. Watts, Lucien H. Boggs, Raymond D. Knight, Robert H. Anderson, William B. Bond, William A. Hallowes, 3rd, Burton Barrs and George W. Milam, of Jacksonville; Lewis Twyman, C. L. Brown, W. L. Reed, E. B. Kurtz, W. I. Evans, Preston G. Prevatt, J. P. Simmons, L. S. Julian, Frank B. Shutts, Lilburn R. Railey and Geo. M. Thompson, of Miami; J. R. Wells, Jack Hays, Hugh Akerman, M. W. Wells, G. Wayne Gray, John G. Baker, Giles F. Lewis, George B. Carter, Donald Walker, W. L. Tilden, Merton S. Horrell, of Orlando; Sam H. Mann, Jr., John Dickinson, M. L. Blanchard, Robt. S. Baynard, T. Frank Hobson, Charles J. Schuh, Paul F. Fusselman, H. L. McClothlin, James R. Bussey, Erle B. Askew, William C. Kaleel, Austin L. Richardson, Harry C. Chubb, Merle E. Rudy, Allen C. Grazier, John D. Harris, Frank M. Harris and McKinney Barton, of St. Petersburg.

HAWAII

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Benjamin L. Marx, of Honolulu, for the office of State Delegate for and from the Territory of Hawaii, to be elected in 1938:

Wm. H. Heen, W. R. Ouderkirk, G. D. Crozier, Daniel G. Ridley, Arthur

G. Smith, Sanford B. D. Wood, Norman W. Applegarth, J. Russell Cades, Robbins B. Anderson, Livingston Jenks, U. E. Wild, Antonio Perry, R. A. Vitousek, W. L. Stanley, C. Dudley Pratt, Dudley C. Lewis, Wade Warren Thayer, J. P. Russell, F. E. Thompson, William B. Lymer, H. T. Kay, Edward K. Massee, Peter A. Lee, S. C. Huber, Charles M. Hite, J. M. Monsarrat, and Edward M. Watson, of Honolulu.

ILLINOIS

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Charles M. Thomson of Chicago, Illinois, for the office of State Delegate for and from the State of Illinois, to be elected in 1938:

Charles R. Webster, Herbert N. Woodward, Tappan Gregory, Joseph M. Larimer, Charles E. Green, William R. T. Ewen, Morton A. Mergentheim, Donald B. Hatmaker, Mitchell Dawson, Hayes McKinney, Charles Leviton, Clarence P. Denning, Clay Judson, Lawrence C. Mills, Thomas L. Owens, William M. James, Morton John Barnard, Henry F. Tenney, Harry N. Gottlieb, Albert E. Jenner, Jr., John M. Cameron, Royal W. Irwin, Lambert Kaspers, George B. McKibbin, Hamilton K. Beebe, Walter E. Beebe, Charles S. Pratt, Thurlow G. Essington, Harris F. Williams, Dwight S. Bobb, James F. Spoerri, Charles J. Scofield, Jr., Irvin H. Fathchild, J. E. Beach, Donald W. Nofri, Glenn E. Baird, Joseph M. Griffen, Walter T. Fisher, Willard L. King, William McKinley, Frederic A. Fischel, H. J. Heart, John J. Sharon, Joseph G. Gorman, Beverly B. Vedder, Charles L. Byron, Frederic Burnham, Paul M. Godehn, C. R. Hillyer, James P. Carey, Jr., Frank S. Sims, James S. Handy, Richard A. Beck, Charles S. Connell, David S. Sampsell, James J. Magner, Cassius M. Doty, Morris I. Leibman, Charles R. Sprowl, Orville J. Taylor, Whitney Campbell, John S. Miller, Louis A. Kohn, Wm. D. Doggett, Carl Cohn, Frank D. Mayer, J. X. Schwartz, M. Paul Noyes, Richard Mayer, Hendrik Folonie, Robert J. Folonie, Jeffrey Shedd, Benjamin F. Langworthy, Richard J. Finn, William H. Sexton, P. J. Lucey, Matilda Fenberg, Helen M. Cirese, Elsa C. Beck, Joseph F. Grossman, Henry Fitts, Philip R. Davis, Edward Hershenson, Lawrence J. West, Samuel B. Blanksten, J. H. Schwartz, Werner W. Schroeder, Ernest F. Staub, George Nunez Cardozo and French Waterman; Henry P. Chandler, Walter V. Schaefer, Howard B. Bryant, Frederick Dickinson, W. S. Warfield, III, Bruce Johnstone, U. S. Schwartz, Harry P. Weber, Moore M. Peregrine, Charles S. Graves, Herbert J. Campbell, Milton H. Sachsel, Hamilton K. Beebe, Kenneth McCracken, Frederick J. Newey, Alfred R. Bates, Elmer M. Leesman, Charles R. Holton, Robert S. Cushman, Amos H. Watts, Frederick A. Brown, G. Gale Roberson, of Chicago; Paul MacGuffin, of Libertyville.

Clarence W. Heyl, George A. Shurtleff, Harry Dale Morgan, Frederick V. Arber, Oscar P. Westervelt, Frank T. Miller, William L. Eagleton, John E. Cassidy, L. O. Eagleton, Roscoe Herget and John M. Niehaus, Jr. of Peoria.

INDIANA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Eli F. Seebirt, of South Bend, Indiana, for the office of State Delegate for and from the State of Indiana, to be elected in 1938:

F. H. Hatfield, Phelps F. Darby, Louis L. Roberts, Isidor Kahn, Joseph H. Iglehart, and Richard R. McGinnis, of Evansville; Alfred H. Highland, Charles G. Bomberger, Louden L. Bomberger, Glenn D. Peters, Timothy P. Galvin, Carl A. Huebner and F. C. Crumpacker, of Hammond; Arthur L. Gilliom, Fred C. Gause, Jeremiah L. Cadick, Herman W. Kothe, Warrack Wallace, Hugh E. Reynolds, Theodore L. Locke, Clarence F. Merrell, Harold H. Bredell, W. H. Thompson, Albert L. Rabb, George L. Denny, Frederick E. Matson, Robert D. McCord, J. W. Fesler, Harvey J. Elam, Alan W. Boyd, John Rabb Emison, Harry T. Ice, Wm. H. Wemmer, Fred B. Johnson, Earl B. Barnes and Harvey B. Hartsock, of Indianapolis.

IOWA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate George Murray, of Sheldon, Iowa, for the office of State Delegate for and from the State of Iowa:

Owen Cunningham, John J. Halloran, O. S. Franklin, Loy Ladd, Dring D. Needham, Gibson C. Holliday, William F. Riley, Phineas Henry, Howard J. Clark, Leo J. Lucier, Joseph I. Brody, L. A. Parker, M. B. Oransky, Robert T. Bates, Maxwell O'Brien, Thomas J. Guthrie, J. L. Parrish, Jr., and W. B. Sloan of Des Moines;

J. M. Otto, Frank F. Messer, William R. Hart, D. C. Nolan, Rollin M. Perkins, Mason Ladd, Percy Brodwell, O. K. Patton, Wiley Rutledge, Paul Sayre and E. A. Gilmore, of Iowa City;

Alan W. Loth, D. M. Kelleher and Seth Thomas, of Fort Dodge; C. F. Stilwill, T. P. Cleary, D. P. Shull, D. C. Shull, Carlos W. Goltz, Rollo H. Bergeson and Henry C. Shull, of Sioux City; J. W. Cory, Jr., of Spencer; James L. Devitt, of Oskaloosa; Clarence D. Roseberry, C. W. Pitts and James P. Kelley, of Le Mars.

IOWA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Truman S. Stevens, of Des Moines, Iowa, for the office of State Delegate for and from the State of Iowa, to be elected in 1938:

Walter R. Dyer, J. W. Jordan, L. H. Doran and Walter Canaday, of Boone; G. A. (Arthur G.) Minnich and Chas. C. Helmer, of Carroll; J. M. Grimm, T. M. Ingersoll, H. E. Spangler, A. H. Sargent, Stewart Holmes, Wm. W. Crissman, B. L. Wick, David G. Bleakley, John D. Randall, Elmer A. Johnson, H. C. Ring, Robert D. Taylor and G. P. Linville, of Cedar Rapids; Maynard E. Penquite, of Colfax; Folsom Everest, Karl F. Geiser, William E. Mitchell, J. A. Williams, P. C. Rasmussen, Harry L. Cherniss and Walter S. Stillman, of Council Bluffs; F. C. Harrison, Jas. W. Bollinger, H. B. Betty, Walter M. Balluff, A. G. Bush, Alfred C. Mueller, Merrill M. Blackburn, Realff Ottesen, Edward A. Doerr, Wayne G. Cook, Charles D. Waterman, E. J. Carroll, Albert F. Block, (Miss) Frances E. Plath, Charles H. Wilson, Carl H. Lambach and A. G. Sampson, of Davenport; Henry C. Kenline, Hal Reynolds, Robert Kenline, W. A. Smith, M. H. Czizek, E. E. Bowen and John G. Chalmers, of Dubuque; C. W. Garfield and Franklin Jaqua, of Humboldt; Burt J. Thompson, Dudley Weible and L. A. Jensen, of Forest City; Chas. E. Hird and E. B. Wilson, of Jefferson; E. W. McManus, John M. Rankin, G. L. Norman, William Swazey Timberman and Wm. R. Sheridan, of Keokuk; H. D. Keeley, of Maquoketa; H. G. Cartwright, C. H. E. Boardman and G. A. Mote, of Marshalltown; Frank W. Senneff, of Britt; R. F. Clough, Earl Smith and Hugh H. Shepard, of Mason City; Eugene C. McCoid, of Mt. Pleasant;

Guy Hall of Dallas Center; F. L. Bihlmeier, Arthur Hoffman, Harvey G. Allbee and Earl Raymond Tipton, of Muscatine; Tim. J. Campbell, J. E. Cross, L. D. Cunningham, W. Keith Hamill and Peter John Siegers, of Newton; Walter McNett, John Webber, Bailey C. Webber, Geo. F. Heindel and Merrill Gilmore, of Ottumwa; William Paul Ferguson and Thos. W. Keenan, of Shenandoah; Frederick F. Faville, R. H. Hatfield, David W. Stewart, Bernard T. Caine, A. D. Clem, Jesse E. Marshall, C. F. Stillwill, D. C. Shull, Rollo H. Bergeson, J. C. Gleysteen, Vail E. Purdy, F. E. Gill, Lester C. Da-

vidson, T. P. Cleary, Alfred Pizey, Egbert M. Badgerow, Everett Waller, Louis S. Goldberg, A. H. Bolton, D. P. Shull and Henry C. Shull, of Sioux City; B. F. Swisher, B. F. Butler, Carleton Sias, Harry M. Reed and John S. Tuthill, of Waterloo; O. J. Henderson and Eleanor M. Jones, of Webster City; Edgar Musgrave, Wilbur J. Bridges, A. R. Shepherd, Casper Schenk, Sam Abramson, Gibson C. Holliday, Willis J. O'Brien and Eskil C. Carlson, of Des Moines; Jesse A. Miller, Alex M. Miller, Frederic M. Miller, Oliver H. Miller, George Cosson, H. H. Stipp, J. Rosenfield, Vincent Starzinger, Eugene D. Perry, L. A. Parker, Herschel G. Langdon, Allan A. Herrick, James B. Weaver, Phineas M. Henry, G. E. Brammer, Robert T. Bates, Merrill B. Oransky, Frank W. Davis, Joseph Brody, James C. Davis, Jr., A. B. Howland, Howard J. Clark, Rex Fowler, Ray C. Fountain, F. W. Lehmann, Jr., Wm. L. Hassett, Emory M. Nourse, Dwight Brooke, J. P. Lorentzen, Clifford V. Cox, W. Proctor, H. A. Steele, James E. Goodwin, H. M. Havner, A. A. McLaughlin, Elizabeth Hyde, R. L. Read, W. C. Strock, Loy Ladd, O. S. Franklin, Dring D. Needham, Harry E. Beach, Gordon L. Elliott, Neill Garrett, Ben J. Gibson, and Walter K. Stewart, of Des Moines; L. F. Sutton, E. L. Miller and F. L. Holleran, of Clinton.

KENTUCKY

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Frank M. Drake, of Louisville, Kentucky, for the office of State Delegate for and from the State of Kentucky, to be elected in 1938 for the vacancy now existing and for the regular term of three years:

Lafon Allen, John C. Doolan, Thomas J. Wood, Blakey Helm, T. Kennedy Helm, William W. Crawford, A. J. Carroll, Edward P. Humphrey, Marvin H. Taylor, Robert Lee Blackwell, Irvin Marcus, J. Donald Dinning, Howard O. Hunn, David McCandless, Jr., G. W. Norton, Jr., W. J. Goodwin, Wesley J. Rogers, John Marshall, Jr., Wilson W. Wyatt, Samuel R. Wells, H. L. Van Arsdale, William H. Abell, W. M. Bullitt, Leo T. Wolford, Henry E. McElwain, Jr., David R. Castleman, Charles W. Milner, Greenberry Simmons, Norton L. Goldsmith, Joseph Selligman and S. L. Greenebaum, of Louisville;

Clinton M. Harbison, Wm. B. Gess, Grover Thompson, James Park, J. R. Bush, George R. Hunt, John P. Crosby, Wm. L. Wallace, Richard C. Stoll, Wm. H. Townsend, Sam'l M. Wilson, Angus W. McDonald, Ben L. Kessinger, E. L. McDonald, R. J. Colbert, Job D. Turner, Jr., Dan E. Fowler and W. T. Fowler, of Lexington.

LOUISIANA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Henry P. Dart, Jr., of New Orleans, Louisiana, for the office of State Delegate for and from the State of Louisiana, to be elected in 1938:

C. C. Bird, Jr., of Baton Rouge; St. Clair Adams, H. Grady Price, Leonard B. Levy, Wm. H. McClendon, Jr., Henry B. Curtis, Scott E. Beer, H. W. Robinson, John St. Paul, Jr., Leon Sarpy, John C. Foster, Burt W. Henry, Edward Rightor, Charles E. Dunbar, Jr., Eugene J. McGivney, Solomon S. Goldman, James J. A. Fortier, Felix J. Dreyfous, Stamps Farrar, Charles Rosen, Jno. E. Jackson, Chas. F. Fletchinger, Louis C. Guidry and Richard B. Montgomery, of New Orleans; John H. Tucker, Jr., of Shreveport.

MICHIGAN

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate John M. Dunham, of Grand Rapids, Michigan, for the office of State Delegate for and from the State of Michigan, to be elected in 1938:

Henry M. Bates, of Ann Arbor; Wendell Brown, and Ezra W. Lockwood of Detroit; Harry G. Gault, Matthew Davison, Jr., Homer J. McBride, Guy W. Selby, George W. Cook and D. L. McTaggart, of Flint; Willard F. Keeney, Morton Keeney, Harry Shulsky, Julius H. Amberg, Roger B. Keeney, Laurent K. Varnum, Edgar H. Johnson, Philip H. Travis, Carl J. Riddering, Gordon B. Wheeler, Stuart E. Knappen, Harold W. Bryant, Ganson Taggart, T. Gerald McShane, Chas. O. Hilding, Benn M. Corwin, John Duncan McDonald, Oscar E. Waer, Cyrus W. Rice, John S. McDonald, William R. McCaslin, Leon W. Harrington, Charles McPherson, Cornelius Hoffius, John D. B. Luyendyk, Jay W. Linsey, Roland M. Shivel and Cornelius Wiarda, of Grand Rapids; Norman E. Leslie, W. K. McInally, J. Adrian Rosenburg, Harlan P. Cristy, Benj. Kleinstiver, John E. Anderson and Reuben H. Rossman, of Jackson; Clayton F. Jennings, David R. Bishop, Carroll R. Taber, Edward K. Ellsworth, Byron L. Ballard and Edmund C. Shields, of Lansing; Raymond H. McLean, of Mason; Harold H. Smedley and Alex J. Rogoski, of Muskegon; Cloyd A. Calvert, John T. Garey, Lloyd T. Crane and Raymond R. Kendrick, of Saginaw.

MICHIGAN

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Roberts P. Hudson, of Sault Ste. Marie, Michigan, for the office of State Delegate for and from the State of Michigan, to be elected in 1938:

R. O. Bonisteel, of Ann Arbor; John A. Mustard, Burritt Hamilton, of Battle Creek; Harry Allen, F. A. Carey and Edward S. Reid, Jr., of Birmingham; Merlin Wiley, Fred G. Dewey, Ezra H. Frye, Oscar C. Hull, Abram W. Sempliner, Jason L. Honigman, John J. Danhof, Irvin Long, Paul W. Voorhies, John C. Spaulding, Maxwell E. Fead, Edgar H. Ailes, William J. Shaw, Glenn M. Coulter, Carl V. Essery, Louis C. Miriani, Leo I. Franklin, Arthur J. Lacy, George E. Bushnell, Howard D. Brown, Archibald Broomfield, Charles H. L'Hommedieu, Henry I. Armstrong, Jr., Arthur Webster, and Thomas G. Long of Detroit; Russell A. McNair, of Grosse Pointe; Paul Franseth and Cleveland Thurber, of Grosse Pointe Farms; Frederic S. Glover, Jr. and Marion S. Harlan, of Grosse Ile; H. C. Jackson and Marvin Schaberg, of Kalamazoo; Walter S. Foster, Joseph W. Planck and Dean W. Kelley, of Lansing; Louis H. Fead, of Newbury.

MINNESOTA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Morris B. Mitchell, of Minneapolis, Minnesota, for the office of State Delegate for and from the State of Minnesota, to be elected in 1938:

James H. Hall and Albert H. Enersen, of Marshall; Monte Appel, Oscar Hallam, John J. Sexton, Asa G. Briggs and Chas. W. Briggs, of St. Paul; F. H. Stinchfield, Stanley B. Houck, J. B. Faegre, Philip F. Sherman, C. A. Taney, Jr., Chester W. Johnson, James I. Best, Eugene N. Best, Herbert W. Rogers, Thomas E. Sands, Jr., Andrew N. Johnson, Fred N. Furber, David Shearer, Paul J. Thompson, Maurice A. Hessian, L. B. Byard, George W. Strong, Walter J. Trogner, M. J. Ward, Florence M. Selander, Carsten L. Jacobson, Chester L. Nichols, G. T. Carroll and Henry W. Norton, of Minneapolis.

MISSISSIPPI

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate William H. Watkins, of Jackson, Mississippi, for the office of State Delegate for and from the State of Mississippi, to be elected in 1938:

Robert N. Somerville, of Cleveland; L. Barnett Jones, P. H. Egger, Jr., Forrest B. Jackson, W. E. Morse, Garner W. Green, Cecil F. Travis, J. G. Mc-

Gowen, Hubert S. Lipscomb, F. J. Lotterhos, J. C. Satterfield, Mrs. Elizabeth Hulen, W. H. Watkins, Jr., Sydney Smith, Greek L. Rice, J. Morgan Stevens, W. C. Wells, George Butler, H. V. Watkins, Marcellus Green, V. A. Griffith, C. B. Snow, J. N. Flowers and Ralph B. Avery, of Jackson; Gerard H. Brandon, Natchez; D. C. Bramlette and Maxwell Bramlette, of Woodville.

MISSOURI

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Laurance M. Hyde, of Jefferson City, Missouri, for the office of State Delegate for and from the State of Missouri, to be elected in 1938:

Nick T. Cave, William H. Becker, George A. Spencer and Howard B. Lang, Jr., of Columbia; E. W. Jones, John Z. Montgomery, John T. Martin, D. S. Lamm and J. T. Montgomery, of Sedalia; Clif Langsdale, Manvel H. Davis, Ford R. Nelson, John F. Rhodes, Robert B. Fizzell, Robert D. Garver, John T. Harding, D. A. Murphy, John M. Cleary, Jr., William S. Hogset, Richard P. Brous, Maurice H. Winger, W. H. Cloud, William Buchholz, Fred Ruark, R. C. Tucker, Edward S. North, Fred S. Hudson and William C. Lucas, of Kansas City; Frank C. Mann, John S. Farrington, Richard Farrington, A. M. Curtis, Jack S. Curtis, John H. Fairman, Flavius B. Freeman, Arthur W. Allen, Robert Durst, Frank B. Williams, W. D. Tatlow, F. M. McDavid, Edgar P. Mann, J. Weston Miller, Lon S. Haymes, Wm. L. Vandeventer and Harry G. Neale, of Springfield; James S. Cimrall, of Liberty; James H. Hull, of Platte City; R. L. Douglas, Joseph M. Garvey, H. Templeton Brown, R. A. Brown, Jr., Orestes Mitchell and DuVal Smith, of St. Joseph; Nat M. Lacy, of Macon; Richard Chamier, Arthur B. Chamier and Oak Hunter, of Moberly; W. H. Martin, of Boonville.

MONTANA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate W. J. Jameson, of Billings, for the office of State Delegate for and from the State of Montana, to be elected in 1938:

R. F. Gaines, T. J. Davis, John E. Corette, Robert D. Corette, W. M. Kirkpatrick, A. C. Kremer, J. A. Poore, John V. Dwyer, D. J. Stivers, J. E. Corette, Jr., and L. V. Ketter, of Butte; R. H. Glover, Harvey Blaine Hoffman, John McKenzie, Jr., Ransom Cooper, O. B. Kotz, H. C. Hall and J. W. Freeman, of Great Falls; W. L. Clift, Taylor B. Weir, Harry P. Bennett, E. M. Hall, Carl Rasch and Lew L. Callaway, of Helena; John L. Campbell, Edmund T. Fritz, W. L. Murphy, Russell E. Smith and Walter L. Pope, of Missoula.

NEVADA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate George S. Brown, of Reno, Nevada, for the office of State Delegate for and from the State of Nevada, to be elected in 1938:

Samuel Platt, John S. Sinai, Chas. A. Cantwell, Albert D. Ayres, Miles N. Pike, Charles M. Merrill, Robert M. Price, Harlan L. Heward, Lester D. Summerfield, Sidney W. Robinson, George Springmeyer, Frank B. Gregory, Joseph P. Haller, Wm. McKnight, Lloyd V. Smith, Clel Georgetta, C. R. Pugh, Edward F. Lunsford, H. H. Atkinson, George L. Vargas, John Davidson, W. S. Boyle, Leon Shore, John Bernard Foy, Thomas F. Ryan, Walter Rowson, Gordon W. Rice and J. T. Rutherford, of Reno.

NEW MEXICO

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate George S. Klock of Albuquerque, New Mexico, for the office of State Delegate for and from the State of New Mexico, to be elected in 1938:

Pearce C. Rodey, Don L. Dickason, Theodore E. Jones, A. H. McLeod, Merritt W. Oldaker, Donald B. Moses, William A. Brophy, Richard H. Hanna, Merritt C. Mechem, Daniel A. MacPherson, Jr., C. M. Botts, Robert W. Botts, J. S. Vaught, Fred Feasel, Sam G. Bratton, John F. Simms, George S. Klock, R. J. Nordhaus and Henry G. Coors, of Albuquerque; J. M. Hervey, Hiram M. Dow, Curtis Hill, Clarence E. Hinkle, Chas. R. Brice and Ross L. Malone, Jr., of Roswell; E. R. Wright, Carl H. Gilbert and B. P. Wood, of Santa Fe.

NEW YORK

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate James W. Ryan, of New York City, for the office of State Delegate for and from the State of New York, to be elected in 1938:

David S. Jackson, Laurence E. Coffey, Charles S. Desmond, and Thomas C. Burke, of Buffalo; D. Roger Englar, George C. Sprague, George deForrest Lord, Theodore Kiendl, John W. Crandall, J. M. Richardson Lyeth, David Asch, Spier Whitaker, Theodore L. Bailey, John Tilney Carpenter, Ben A. Matthews, Harold Harper, O. D. Duncan, Edward R. Brumley, Morris Cooper, Jr., Melville J. France, George S. Brengle, Martin Detels, Leonard J. Matteson, P. J. R. McEntegart, Charles F. Quantrell and E. Curtis Rouse, Edwin L. Garvin, Walter R. Kuhn, Courtland Palmer, Harry D. Thirkield and Paul H. Lacques, of New York City.

NORTH DAKOTA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate C. L. Young, of Bismarck, for the office of State Delegate for and from the State of North Dakota to be elected in 1938:

Max A. Wishek, of Ashley; Geo. F. Shafer, George S. Register and H. F. O'Hare, of Bismarck; G. D. Reimers, of Carrington; Fred J. Traynor, Mack V. Traynor and W. M. Anderson, of Devils Lake; F. L. Dwight, H. G. Nilles, Clair F. Brickner, E. T. Conmy, Franklin J. Van Osdel, J. M. Powers and George Soule, of Fargo; Floyd B. Sperry, of Golden Valley; Victor L. Thom, of Goodrich; Harrison A. Bronson, C. J. Murphy, Frank Kilgore, Philip R. Bangs, O. B. Burtness, Harold Shaft, Carroll E. Day, C. F. Peterson, T. A. Toner and O. H. Thormodsgard, of Grand Forks; Aloys Wartner, of Harvey; John Moses and Theodore A. Sailer, of Hazen; Chas. H. Shafer, of Hillsboro; Frank T. Lembke, of Hettinger; Arthur L. Knauf, John Knauf, C. S. Buck, A. W. Aylmer and R. E. Fredericks, of Jamestown; Alfred M. Kvello and S. B. Adams, of Lisbon; L. J. Palda, Jr., R. A. Nestos, John H. Lewis and Robert H. Bosard, of Minot; John A. Stormon, of Rolla; L. T. Sproul, of Valley City; Wm. M. Hutchinson, of Wahpeton.

OHIO

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Joseph L. Stern, of Cleveland, for the office of State Delegate for and from the state of Ohio, to be elected in 1938:

Grover C. Hosford, Morton S. Brockman, Arthur P. Gustafson, Harry F. Payer, C. D. Friebolin, Albert J. Sanders, Gerald A. Doyle, Marc J. Grossman, William E. Chilton, Howard L. Barkdull, Joseph C. Bloch, S. Q. Kerruish, Charles W. Stage, Jr., Edward C. Stanton, Samuel H. Silbert, Grace B. Doering, Charles M. Buss, Charles A. Niman, Carl W. Schaefer, Howell Leuck, Lex Kintner, Herman J. Nord, J. M. Berne, J. M. Ulmer, of Cleveland; Hugh Wells and John B. Hull, of Shaker Heights.

OHIO

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Charles W. Racine, of Toledo, Ohio, for the office of State Delegate for and

from the State of Ohio, to be elected in 1938:

Robert Guinther, H. W. Slabaugh, J. B. Huber, Geo. J. Carson, W. E. Slabaugh, Francis Seiberling, Clarence R. Foust, P. H. Stevens, Thomas M. Powers, Frank H. Harvey, Edwin W. Brouse, A. H. Englebeck, John V. Cotton and Wm. A. Kelly, of Akron; Morison R. Waite, Ed F. Alexander, Sol Goodman, Edward P. Moulinier, Charles E. Weber, Rowland Shepard, Nelson J. Cohen, M. L. Ferson, John Randolph Schindel, William A. Eggers, Starbuck Smith, Murray Seasongood, Robert P. Goldman, Lester A. Jaffe, Clyde M. Abbott and Albert D. Alcorn, of Cincinnati; Henry G. Binns, Carl Tresemer, Francis J. Wright, Earl F. Morris, John C. Harlor and Frank J. Collopy, of Columbus; Wm. A. Mason, of Youngstown; J. H. Beatty, Lehr Fess, Harold S. Green, J. Eugene Farber; U. G. Denman, Milo J. Warner, Joseph D. Stecher, Joseph A. Yager, Richard D. Logan, Ross W. Shumaker and J. I. O'Connor, of Toledo.

OREGON

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Sidney Teiser, of Portland, Oregon, for the office of State Delegate for and from the State of Oregon, to be elected in 1938:

Lawrence T. Harris, David B. Evans, S. M. Calkins and Wayne L. Morse, of Eugene; Geo. R. Bagley, of Hillsboro; Carl G. Helm, Colon R. Eberhard, J. W. Knowles and R. J. Green, of La Grande; Francis E. Marsh, W. V. Vinton and Eugene Marsh, of McMinnville; Geo. M. Roberts, of Medford; Will M. Peterson, A. S. Cooley, J. R. Raley and C. Z. Randall of Pendleton; A. N. Orcutt, of Roseburg, Celia L. Gavin, of The Dalles; Custer E. Ross, Bert T. Ford, Allan G. Carson, I. H. Van Winkle, Grace Elisabeth Smith, Willis S. Moore, George Rossman, H. J. Bean, John L. Rand and Percy R. Kelly, of Salem; Claude McColloch, Estes Snedecor, Leo J. Hanley, Stephen H. Boyles, A. L. Gordon, V. Lyle McCroskey, Wm. S. Nash, Lowell C. Paget, Robert Tucker, Robert O. Boyd, Louis P. Hewitt, James W. Crawford, J. P. Winter, A. E. Clark, Cassius R. Peck, Ralph S. Hamilton, Earl C. Bronaugh, W. Lair Thompson, Wallace McCamant, Samuel S. Jacobson, Mark N. Matthiessen, Erskin Wood, John C. Kendall, Jay Bowerman, Everett A. Johnson, Newton C. Smith, P. W. Cookingham, David C. Pickett, Harry L. Raffety, Walter M. Huntington, Roland Davis, H. E. Collier, Walter S. Asher, Gunther F. Krause, Virgil Crum, S. J. Graham, M. H. Clark, E. M. Morton, W. M. Davis, McDannell Brown, Arthur I. Moulton, George J. Perkins, Wm. A. Carter, Robert Treat Platt, C. X. Bollenback, Chas. W. Redding, James H. McMenamin, L. W. O'Rourke, Randall S. Jones, Benj. B. Goodman, Geo. B. Guthrie, John F. Reilly, R. R. Bullivant, Robert J. Creamer, E. L. McDougal, Arthur Langguth, Ida Ruth Gordon, Wendell Gray, J. Hunt Hendrickson, Barnett Goldstein, Edgar Freed, Walter L. Tooze, Dan J. Kenney, B. G. Skulason, Glenn E. Husted, Blaine B. Coles, John A. Beckwith, Ralph A. Coan, W. P. Donelly, Abe Eugene Rosenberg, Edward A. Boyrie, Wm. B. Layton, Silvanus Kingsley, Frederick Piper, Dan J. Malarkey, F. R. Salway, Benjamin B. Beekman, George Neuner, B. A. Green, J. J. Quillin, Arthur Lind, B. E. Youmans, Carl E. Davidson, Chester A. Sheppard, J. O. Stearns, Sr., Howard T. McCulloch, J. C. Veazie, John A. Laing, Joseph K. Carson, William C. McCulloch, John C. Veatch, Alfred A. Hampson, Roscoe C. Nelson, Jr., Frank C. McColloch, James C. Dezendorf, Andrew Koerner, Herbert Swett, Alfred P. Kelley, Clarence J. Young, R. R. Morris, Paul P. Farrens, V. V. Pendergrass, Fred W. Bronn, Homer D. Angell and Robert L. Sabin, Jr., of Portland.

PENNSYLVANIA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Burtt Harris, of Pittsburgh, for the office of State Delegate for and from the State of Pennsylvania, to be elected in 1938:

J. Colvin Wright, Bedford; W. D. Gallup, Bradford; F. G. Moorhead, Beaver; Joseph D. Calhoun, Media; Thos. J. Baldridge, Hollidaysburg; Aaron S. Swartz, Jr., Norristown; Thomas C. Egan, C. Barton Brewster and J. Harry LaBrum, of Philadelphia; Thos. M. Benner, Geo. J. Campbell, John W. Cost, Judson A. Crane, Gifford K. Wright, Wm. B. McFall, H. E. Hackney, John G. Buchanan, A. E. Kountz, Ralph D. McKee, James Milholland, William H. McNaugher, Pier Dannals, Joseph A. Richardson, William H. Eckert, Harvey Morton Aronson, Harold Obernauer, G. Dixon Shrum and Waldo P. Breeden, of Pittsburgh; John W. Murphy, of Scranton, E. H. Bane, of Uniontown; John C. Youngman, of Williamsport.

PENNSYLVANIA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Bernard J. Myers, of Lancaster, Pennsylvania, for the office of State Delegate for and from the State of Pennsylvania, to be elected in 1938:

Harris C. Arnold, William B. Arnold, Clay M. Ryan, W. G. Johnstone, Jr., William H. Keller, Robert Ruppin, Jacques K. Geisenberger, Charles L. Miller, B. M. Zimmerman, John E. Malone, H. Edgar Sherts, G. T. Hambright, H. Frank Eshleman, Chas. G. Baker and Daniel B. Strickler, of Lancaster;

John L. Hamaker, of Ephrata; Charles Townley Larzelere, of Norristown; R. S. Hemingway, of Bloomsburg; Edgar S. Richardson, of Reading; John E. Cupp, S. T. McCormick and M. C. Rhone, of Williamsport; W. J. Fitzgerald, C. Reynolds Bedford and Joseph F. Gunster, of Scranton; Charles H. English, of Erie; John McI. Smith, Sterling G. McNees and M. Vashti Burr, of Harrisburg;

Robert T. McCracken, Harold B. Beitler, W. W. Montgomery, Jr., M. Louise Rutherford and Joseph W. Henderson, of Philadelphia; Gifford K. Wright, John G. Buchanan and Harold Obernauer, of Pittsburgh; J. Colvin Wright, of Bedford; Harry S. Knight and Carl Rice, of Sunbury; Paul S. Lehman and Harry L. Siegel, of Lewistown.

RHODE ISLAND

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate James C. Collins, of Providence, Rhode Island, for the office of State Delegate for and from the State of Rhode Island, to be elected in 1938:

Chauncey E. Wheeler, Frank L. Hinckley, Hayward T. Parsons, Roger T. Clapp, Frederick W. Tillinghast, Arthur M. Allen, Benjamin R. Sturges, Harold P. Salisbury, William A. Needham, Albert deR. Baker, Sigmund W. Fischer, Jr., Albert A. Baker, Fred B. Perkins, Andrew P. Quinn, Gurney Edwards, Frederick W. O'Connell, Frank F. Mason, Henry C. Hart, Henry M. Boss, James A. Higgins, Harold A. Andrews, Westcote H. Chesebrough, Robert W. Hankins, Frederick W. Arnold, Russell P. Jones, Thomas F. Black, Jr., Harold B. Tanner and Henry B. Gardner, Jr., of Providence.

SOUTH CAROLINA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Alva M. Lumpkin, of Columbia, South Carolina, for the office of State Delegate for and from the State of South Carolina, to be elected in 1938:

Samuel L. Prince, Wm. L. Watkins and A. H. Dagnall, of Anderson; George L. Buist, Frederick H. Horlbeck, J. Waties Waring, D. A. Brockinton, Coming B. Gibbes, Julian Mitchell, B. Allston Moore, Gordon Miller,

Nath. B. Barnwell, John I. Cosgrove, Lionel K. Legge, Arthur R. Young and Henry Buist, of Charleston; J. A. Manning, Douglas McKay, D. W. Robinson, Jr., James F. Dreher, P. H. Nelson, Christie Benet, W. M. Shand, J. B. S. Lyles, J. Waties Thomas, R. K. Wise, W. C. McLain, J. E. Belser, Harry M. Lightsey, Frank B. Gary, Jr., Pinckney L. Cain, Alice Robinson, Charles B. Elliott and Wm. S. Nelson, of Columbia; C. F. Haynsworth, H. J. Haynsworth, E. M. Blythe and Jas. L. Love, of Greenville; M. G. McDonald, C. A. Mays, Douglas Featherstone and A. C. Todd, of Greenwood.

TENNESSEE

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Harley G. Fowler, of Knoxville, Tennessee, for the office of State Delegate for and from the State of Tennessee, to be elected in 1938:

Earl King, W. P. Armstrong, R. E. King, Lowell Taylor, Caruthers Ewing, Jr., J. S. Allen, Benj. Goodman, Jr., Charles G. Morgan, Emmett W. Braden, J. E. McCadden, John B. Snowden, II, Frank J. Glankler, Andrew O. Holmes, Harold S. Leeker, Hamilton E. Little and Jno. W. Loch, of Memphis;

George H. Armistead, Jr. and Cecil Sims, of Nashville; John A. Chambliss, S. Barton Strang and John S. Fletcher, of Chattanooga; John W. Green, Thomas G. McConnell, Robert S. Young and Mitchell Long, of Knoxville.

TEXAS

TO THE BOARD OF ELECTIONS:

The undersigned do hereby nominate Harry P. Lawther, of Dallas, Texas, as State delegate from the State of Texas to be elected in 1938:

John H. Benckenstein and W. M. Crook, of Beaumont; Edward C. Meek, Geo. T. Burgess, Nelson Phillips, Wm. M. Cramer, Searcy L. Johnson, LaVergne F. Guinn, Roy C. Ledbetter, Russell Surles, R. G. Storey, John H. Bickett, Jr., Woodall Rodgers, J. G. Turner, J. Cleo Thompson, D. A. Frank, Marion N. Chrestman, J. Harold Goode, S. P. Sadler, R. T. Bailey, Julius H. Runge, Alvin H. Lane, W. B. Handley and Dallas C. Biggers, of Dallas; W. B. Jack Ball and S. S. Searcy, of San Antonio.

VERMONT

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Walter S. Fenton, of Rutland, Vermont, for the office of State Delegate for and from the State of Vermont, to be elected in 1938:

A. Pearley Feen, H. A. Bailey, Charles F. Black, J. Boone Wilson, K. Paul Fennell, M. G. Leary, Theodore E. Hopkins, Leon D. Latham, Jr., J. H. Macomber, Jr., Omer L. Moreau, Willsie E. Brisbin, Guy M. Page and J. A. McNamara, of Burlington; George L. Hunt, Joseph G. Frattini, William N. Theriault and George B. Young, of Montpelier; Deane C. Davis and J. Ward Carver, of Barre; Christopher A. Webber, E. W. Lawrence, Marvelle C. Webber, Vernon Loveland and R. Clark Smith, of Rutland; Wm. R. McFeeters, Stephen S. Cushing and C. D. Watson, of St. Albans; Osmer C. Fitts, Paul A. Chase, Jno. G. Sargent, John H. Murphy and Ernest E. Moore, of Ludlow; Ralph E. Edwards, Albert T. Bolles, Francis A. Bolles and Almon I. Bolles, of Bellows Falls; Arthur L. Graves, Jutten A. Longmoore, J. Rolf Searles, Walter W. Wesley and Chas. A. Shields, of St. Johnsbury.

VIRGINIA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Thomas B. Gay, of Richmond, Virginia, for the office of State Delegate for and from the State of Virginia, to be elected in 1938:

O. R. McGuire, O. R. McGuire, Jr., Henry L. Young, F. D. Strader and Amos C. Crounse, of Arlington; Gardner L. Boothe, Armistead L. Boothe, John Barton Phillips, J. Randall Caton, Jr., Albert V. Bryan and Henry P. Thomas, of Alexandria; Jno. S. Barbour, Robt. C. McCandlish, Jr., and Charles Pickett, of Fairfax; Stuart Carter, of Bristol; H. W. Walsh, Lyttelton Waddell, W. Allan Perkins, John S. Battle and W. E. Duke, of Charlottesville; E. Walton Brown, Earle Garrett and Edwin B. Meade, of Danville; B. P. Willis, Wm. K. Goolrick, C. O'Conor Goolrick and Wm. J. Gibson, of Fredericksburg; Frank S. Moore, of Lexington.

Mosby G. Perrow, Jr., William Rosenberger, Jr., Royston Jester, Jr., Joseph V. Gorman, Thomas D. Christian, James R. Caskie, Joseph P. McCarron, Robert D. Morrison, S. V. Kemp, S. H. Williams, Henry M. Sackett, Jr., Douglas A. Robertson, Paul E. Sackett, Thomas J. Williams, Paul Whitehead, J. Wallace Ould, Jr., T. G. Hobbs, F. P. Christian, Jr., R. H. T. Adams, Jr., Thos. S. Kirkpatrick, E. Marshall Frost, and A. D. Barksdale, of Lynchburg; Braden Vandeventer, Thomas H. Willcox, Jr., Leigh D. Williams, Tazewell Taylor, Jr., Tazewell Taylor, James Mann, S. Heth Tyler, W. R. C. Cocke, R. M. Hughes, Jr., James E. Heath, John N. Sebrell, Toy D. Savage, J. S. Lawrence, Hugh W. Davis, and Barron F. Black, of Norfolk;

Edmund M. Preston, Henry W. Oppenhimer, A. S. Buford, Jr., J. Jordan Leake, Sam B. Witt, Jr., Jno. G. Hayes, Jr., Ralph T. Catterall, J. McD. Wellford, David H. Leake, M. Carter Hall, LeRoy R. Cohen, Jr., Samuel Regester, Henry Taylor, Jr., Eppa Hunton, IV., John Howard, Charles W. Crowder, Hunsdon F. Cary, R. C. Cabell, Cassius M. Chichester, H. E. Ketner, Wirt P. Marks, Jr., A. Lynn Ivey, Aubrey R. Bowles, Jr., Oscar L. Shewmake, Thomas B. Snead, Curtis M. Dozier, Wm. G. Talley, James R. Lenahan, James A. Betts, Jr., J. Vaughan Gary, Wm. M. Blackwell, Curtis M. Dozier, Jr., William W. Crump, John C. Goddin, Norman L. Flippen, Andrew J. Ellis, George B. White, David Meade White, Luther Libby, Jr., T. Nelson Parker, Louis S. Herrink, Geo. E. Allen, Marion W. Jones, Wilbur G. Mitchell, John J. Fairbank, Jr., Harrison C. Eacho, Dave E. Satterfield, Sherlock Bronson, J. R. Tucker, T. Justin Moore, Robert G. Cabell, James Mullen, Lewis C. Williams, Abram P. Staples, Ralph H. Ferrell, Jr., David J. Mays, George D. Gibson, Henry W. Anderson, Leon M. Nelson, John G. May, Jr., V. P. Randolph, Jr., Thos. A. Williams, J. H. Rives, Jr., Ellsworth L. Wiltshire, S. L. Sinnot, J. Kent Rawley, Hill Montague, William A. Moncure, Archibald G. Robertson, E. Randolph Williams, Legh R. Page, John H. Bocock, Murray M. McGuire, Henry

C. Riely, John S. Eggleston, John A. Coke, Jr., Daniel Grinnan, Stephen H. Simes, Wm. E. Crawford, Lewis F. Powell, Jr., Fielding L. Williams, A. Scott Anderson, L. C. Markel, Stanley B. Markel, R. W. Jordan, Jr., William A. Moncure, Jr., Maxwell G. Wallace, Brockenbrough Lamb, Stuart G. Christian, James W. Gordon, Irvin G. Craig, Collins Denny, Jr., R. E. Peyton, Jr., Henry R. Miller, Jr., W. W. Martin, C. H. Morrissett, Joseph F. Hall and A. Hamilton Bryan, of Richmond;

Curtis Simpson, H. M. Moomaw, John Strickler, E. W. Poindexter, John D. Carr, English Showalter, Horace M. Fox, Chas. D. Fox, Jr., Robert A. Fulwiler, Jr., Paul C. Buford, C. Francis Cocke, Whitwell W. Coxe, Joseph H. Chitwood, T. X. Parsons, William D. Staples, Lucian H. Cocke, Jr., F. M. Rivinus, W. A. Carter, Ralph A. Glasgow, James N. Kincanon, John D. Copenhaver, W. P. Hazelgrove, John L. Walker, Murray A. Foster and Jas. P. Woods, of Roanoke; Floridus S. Crosby, Wyat B. Timberlake, Jr., John D. White, Duncan Curry and J. M. Perry, of Staunton; William H. White, Jr., F. D. G. Ribble, Garrard Glenn and George B. Eager, Jr., of University;

J. Gordon Bohannan, Willis W. Bohannan, Bernard C. Syme, Charles D. Sandford, Wm. Hodges Mann, Jr., and Wm. Earle White of Petersburg; J. Sloan Kuykendall, R. Gray Williams, B. P. Harrison and H. K. Benham, of Winchester; S. P. Campbell and Thomas F. Walker, of Wytheville; Guy F. Ellett, of Christiansburg; H. C. Tyler, of East Radford; James H. Corbitt, Marshall Andrews, Willis E. Cohoon and Marshall L. Bowden, of Suffolk; Frank S. Tavenner, Jr., of Woodstock; Wm. M. Tuck, of South Boston; W. Meade Fletcher, of Sperryville (Richmond); Thos. W. Ozlin, of Kenbridge (Richmond); and Robert R. Parker, of Appalachia.

WASHINGTON

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate O. B. Thorgrimson, of Seattle, Washington, for the office of State Delegate for and from the State of Washington, to be elected in 1938:

A. E. Russell, Alan G. Paine, John E. Blair, Lloyd E. Gandy, Sidney H. Wentworth, H. E. Fraser, F. J. McKevitt, Lester P. Edge, Laurence R. Hamblen, Ralph P. Edgerton, W. B. Chandler, Joseph McCarthy and A. W. Witherspoon, of Spokane; O. G. Ellis, Scott Z. Henderson, L. L. Thompson, A. O. Burmeister, Ralph W. Thompson, E. N. Eisenhower, E. M. Hayden, Hilton B. Gardner, A. E. Blair, and F. D. Metzger, of Tacoma; S. Harold Shefel-

man, James P. Weter, W. E. Froude, William D. Askren, Harry A. Rhodes, W. H. Hayden, Claude E. Wakefield, Warren Brown, Jr., Arthur Grunbaum, J. Speed Smith, A. J. Falknor, Frank E. Holman, William M. Allen, Lowell P. Mickelwait, Welden G. Bettens, George Harroun, W. Paul Uhlmann, Harry Henke, Jr., Frank S. Bayley, Charles S. Albert, Charles Horowitz, Ethan Allen Peyser and Ewing D. Colvin, of Seattle.

WEST VIRGINIA

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate Frank C. Haymond, of Fairmont, West Virginia, for the office of State Delegate for and from the State of West Virginia, to be elected in 1938:

Trevey Nutter, Ernest R. Bell, Harry Shaw, Victor H. Shaw, Clay D. Amos, William P. Lehman, Walter R. Haggerty and Tusca Morris, of Fairmont; Arch M. Cantrall, George M. Hoffheimer, Stewart McReynolds, Ray L. Strother, J. C. McManaway, James M. Guiher, O. L. McDonald, Howard L. Robinson, Stephen D. Griffith, Clifford R. Snider, Melvin G. Sperry, Fred B. Deem, Ronald F. Moist, Lawrence R. Lynch, Arlos J. Harbert and W. G. Stathers, of Clarksburg;

Tom B. Foulk, Wright Hugus, A. W. Laas, Henry S. Schrader, Howard D. Matthews, Charles P. Mead, C. Lee Spillers and Russell G. Nesbitt, of Wheeling; Robert B. McDougle, Mason G. Ambler, James S. McCluer, Wm. Bruce Hoff, Homer Adams, H. O. Hiteshew, F. P. Moats, and J. W. Vandervort, of Parkersburg; Walter L. Brown, C. W. Strickling, Geo. S. Wallace, Jackson Huddleston, J. R. Marcum and S. S. McNeer, of Huntington; Clarence E. Martin and Clarence E. Martin, Jr., of Martinsburg; Zeb H. Herndon, D. J. F. Strother, Thornton G. Berry, Jr., and Joseph M. Crockett, of Welch.

Robt. H. C. Kay, Dale G. Casto, R. G. Kelly, Berkeley Minor, Jr., John V. Ray, W. Chapman Revercomb, John C. Morrison, J. Hornor Davis, 2nd, V. L. Black, W. W. Goldsmith, R. S. Spilman, Jr., Melville Stewart, E. S. Bock, H. D. Battle, Howard R. Klostermeyer, Jackson D. Altizer and Chas. G. Peters, of Charleston; Buford C. Tynes, T. Selden Jones, Paul W. Scott, Taylor Vinson, John E. Jenkins, Samuel Biern, C. W. Freeman, W. K. Cowden, and Wilbert H. Norton, of Huntington.

W. Broughton Johnston, John R. Pendleton and A. W. Reynolds, of Princeton; George Richardson, Jr., Albert S. Kemper, Paul S. Hudgins and Arthur F. Kingdon, of Bluefield; Wells Goodykoontz, Lant R. Slaven, Randolph Bias, J. Brooks Lawson and William B. Hogg, of Williamson; W. L. Lee, of Fayetteville.

WYOMING

TO THE BOARD OF ELECTIONS:

The undersigned hereby nominate William O. Wilson, of Cheyenne, Wyoming, for the office of State Delegate for and from the State of Wyoming, to be elected in 1938:

John D. Clark, George E. Brimmer, George F. Guy, Ralph Kimball, H. B. Henderson, Jr., John U. Loomis, T. Blake Kennedy and Joseph O'Mahoney, of Cheyenne; Joseph Garst, of Douglas; G. R. Hagens, William J. Wehrli, R. H. Nichols, Vincent Mulvaney, Seymour Bernfeld, R. R. Rose, E. E. Enterline, Edward E. Murane and Harold H. Healy, of Casper; E. E. Lonabaugh, D. P. B. Marshall, C. A. Kutcher and H. Glenn Kinsley, of Sheridan; Ernest Goppart, of Cody; R. Dwight Wallace and Louis Kabell, Jr., of Evanston; Frank A. Barrett, of Lusk; P. B. Cooldge, of Lander; C. A. Zaring, of Basin; Preston T. McAvoy and Harry P. Ilsley, of Newcastle; C. A. Brimmer, L. E. Armstrong and Stairs Kenneth Briggs, of Rawlins; F. A. Little, of Greybull; Lewis H. Brown, of Rock Springs.

News of the Bar Associations

Mid-Winter Meeting of Ohio Bar Association

THE Mid-winter Meeting of the Ohio State Bar Association, held at Columbus on January 27 and 28, was marked by a good attendance and an unusually interesting program. Meetings of the Sections and Committees on Thursday showed these agencies functioning actively and making some very constructive recommendations.

The general meeting was called to order Friday morning by President Walter S. Ruff, of Canton, and the address of welcome was delivered by Mayor Myron B. Gessaman, of Columbus, a member of the Franklin County Bar. Mr. Gerritt J. Fredriks, of Cincinnati, Senior Vice President of the Association, responded to the address of welcome.

Various committee reports followed. Mr. Walter L. Flory, of Cleveland, reviewed the work of the statewide campaign committee in charge of the proposed Constitutional amendment to provide for the appointment of judges of the Supreme Court and the Courts of Appeals. He stated that 160,000 signatures had been secured to the petitions and outlined the steps being taken to press the matter to a point where it can be presented to the electorate of the state next November.

Mr. Joseph L. Stern, of Cleveland, Chairman of the Committee on the Unauthorized Practice of Law, reported success in the litigation undertaken to suppress this evil. He added that the Supreme Court of Ohio now stands definitely and unmistakably committed to the doctrine of judicial control over the entire subject of practice of law, both in court and out of court, to the absolute exclusion of the legislative branch of the government, thus sustaining the oft repeated contentions of the committee.

The session was addressed by Prof. John W. MacDonald, Executive Secretary and Director of Research of the New York Law Revision Commission, who spoke on the work and accomplishments of that body. The Commission has a full-time staff of eight lawyers engaged in the study, preparation and research of legislation. After having investigated the subject and presented the proposed legislation, it does not thereafter actively champion the passage of a bill, but simply sees to it that the bill is not lost in the "legislative shuffle." This course has resulted in the Legislature looking more favorably on the Commission's recommendations than it probably would do otherwise.

At the afternoon session, various Committees made their reports. That of the Committee on Membership, by Chairman Robert F. Young, of Dayton, was exceptionally interesting. He reported that the membership of the Association has now reached a new high of approximately 4200, and that of the new members admitted to the bar during 1937, 73% have joined the Association, and plans are now under way to contact the other 27% personally. In order to strengthen and maintain its membership efforts, the Committee reported that it had made the following

recommendations to the Executive Committee:

First, that closer contact be maintained with the graduating classes of the law schools.

Second, the continuation of the program adopted last year of mailing the Ohio Bar to applicants to the bar examination.

Third, that after the newly admitted members are sworn in and as many members as possible obtained, a list of non-members be sent to the committee for personal contact.

Fourth, that invitations to attend the meetings of the State Bar Association be sent to all members of the Bar of Ohio, regardless of membership in the association.

Fifth, that a complete list be prepared of members of the Bar of Ohio, who are not members of the association.

Sixth, that the executive office maintain closer contact with the local associations and provide speakers at the local association meetings to tell of the facilities and advantages of belonging to the State Bar Association.

Seventh, that the program of commission in the way of credit to Junior Bar members on membership dues for new members, adopted last year, be continued.

Eighth, that the Executive Committee consider the advisability of establishing life memberships in the Ohio State Bar Association.

President Walter S. Ruff then made an able address, after which Hon. Martin Dies, member of the House of Representatives from the State of Texas, addressed the Association on the subject, "The Proposed Federal Wages and Hours Bill." Mr. Dies deplored the growing tendency to establish bureaus and departments in Washington and the gradual extension of their authority and usurpation of power by them. He was not opposed to legislation of this type as such, but he did view with alarm any proposed plan for curing evils, where the plans are more of a menace than the evil.

Amendments to the Constitution were adopted to give greater latitude in fixing meeting dates, by deleting the words, "summer and mid-winter meetings" from that instrument. The instrument was also amended to provide that members of the Junior Bar Section shall not be more than 36 years of age, the change being made to bring this limitation in line with that of the Junior Bar Conference of the American Bar Association.

A resolution by Court of Appeals Judge Frank W. Geiger, of Springfield, reported from the Council of Delegates, providing for the original jurisdiction of the Supreme Court of the United States to pass by declaratory judgment upon the constitutionality of acts of Congress, was held for further consideration and report. Various other committees reported, after which the thanks of the Association were voted to President Walter S. Ruff for his work in presiding over the Mid-Winter Meeting.

The banquet was on Friday evening, and an address was made by Hon. Arthur T. Vanderbilt, President of the American Bar Association, who noted some hopeful features of the movement for the improvement of the administration of justice. Mr. Vanderbilt strongly supported the principles embodied in the pending bill for an administrative director for the Federal courts, but suggested certain changes in the measure as now drafted.

Prof. Barton Leach, of Harvard University College of Law, was the final speaker and chose as his subject, "The Vocation and Avocation of a Law Professor." Prof. Leach devoted the latter portion of his address to a review of events and men behind the events of the day in the form of verses of his

own composition, sung to his own accompaniment on an accordion. His address was a pronounced success.

At the Judicial Section meeting, Mr. Froome Morris, of Cincinnati, made an address in which he said that the present plan of using the key-number method of selection of jurors has resulted, through inability to locate male jurors summoned and statutory excuses used, in too many women in the panel, low average in intelligence, absence of experience in jurors and plaintiffs' juries with excessive verdicts. He suggested that appeal be made to business men to make patriotic sacrifices for jury service and that employers absorb the difference between jury compensation and employees' pay.

In the Municipal Law Section, Mr. Henry S. Brainard, of Cleveland, spoke on the application of the Ohio Unemployment Insurance Act to municipalities exercising proprietary functions. The Insurance Law Section and the Real Estate Section had such a large attendance that additional room space had to be provided. The former was addressed by Mr. John L. Davies, Jr., of Columbus, on the "Assured Clear Distance Statute," and the latter by Mr. Charles C. White, of Cleveland, who opened a discussion on "Real Property Law in Ohio."

The Council of Delegates meeting, in the evening, heard an address by Mr. Isidor Lazarus, of New York City, on "The Forgotten Five Million or the Future of the Professions in America." He recommended the establishment of Federal and State Departments of the Professions, charged with the duty of investigating the functioning of justice and devising plans for cooperation.

Pennsylvania Association's Mid-Winter Meeting

ONE of the first actions of the Pennsylvania Bar Association, at its mid-winter meeting in Hershey, Pennsylvania, on January 7 and 8, 1938, was to amend the by-laws so as to provide for "provisional members." The action was taken on motion of Chairman McFall, of the Committee on Admissions. The provisions with respect to this new type of membership are as follows:

". . . All persons, who shall hereafter receive certificates from the State Board of Law Examiners entitling them to admission to the Bar of the Supreme or Superior Court of Pennsylvania, shall thereupon become provisional members of this Association, with all privileges of active membership and without payment of any dues during said provisional membership. Such provisional members shall become active members upon the payment of first year's dues of two dollars in advance as of July first following the first full year of provisional membership, and shall pay two dollars thereafter for the second, third and fourth years' dues and eight dollars for all subsequent years' dues. Provided, however, that such members who fail to pay first year's dues of two dollars within a period of three months after July first following the first full year of provisional membership, shall thereupon be dropped from the rolls of the Association. And provided further that all other eligible lawyers who apply for membership in the Association within the period of five years following their admission to the bar shall pay two dollars annual dues until they shall have passed their fifth anniversary of admission to the Bar, after which they shall pay eight dollars regular dues and this provision shall not be retroactive."

Chairman McFall also reported that six counties have adopted what is known as "The Clearfield County Plan" and are now engaged in the task of enrolling in the Pennsylvania Bar Association all the members of their Bars who are eligible for membership in the State Association. This plan was later approved by the Executive Committee and its adoption recommended to all the County Bar Associations. Details of this unique departure in the way of membership enrollment are given in the statement by Mr. John E. Dwyer, member of the Committee on Admissions and Chairman of Zone 7 of the Pennsylvania Bar Association. He is referring to its adoption in Erie County, and because of the novelty of the device and its possible interest for other Bar Associations, the following details are given from this statement:

"The plan is a simple one. The Court, at the instance and instigation of the Local Bar Association, was requested to amend the local Rules of Court so as to provide for a 10 per cent deduction from all fees paid Masters in Divorce Cases. At the same time the Court was asked to raise the Masters' fees so that the Master should net as much after the amendment as before. This 10 per cent is to be deducted by the Prothonotary from the money paid into Court and is to be remitted by him to the Treasurer of the Erie County Bar Association who will pay to the Pennsylvania Bar Association the annual dues of all members of the Erie County Bar Association and will pay, as well,

the dues of the members to the local Association.

"The monthly meetings of the Erie County Bar Association are well attended, but the Committee felt that a matter of this kind should not be undertaken by any group without first acquainting all members of the Association with the details of the plan. With this in mind, a petition setting forth the plan and recommending its adoption was prepared and circulated among the members of the Bar. The petition was first circulated at a meeting of the Junior Bar of Erie County where it met with unanimous approval, twenty-eight signatures being thus obtained. The Committee met with cooperation and enthusiasm on every side. Only five men refused to sign the petition, three were not interviewed, and, of course, the judges were not asked to sign the petition. . . .

"At a meeting of the Erie County Bar Association, held on December 9, 1937, a formal resolution, recommending the plan, was presented and passed. . . . On December 10, 1937, the Court informed the Committee that the Rules of Court would be amended so as to conform to the Resolution."

After hearing the conclusion of Chairman McFall's report, the general meeting of the Association was recessed in order to give the various committees an opportunity to meet and deliberate. The Executive Committee thereupon went into session and transacted a good deal of business. It authorized the creation of a joint committee of the Bar Association and the Pennsylvania Institute of Certified Public Accountants to study and consider the problems of the relationship of the two professions; fixed June 22, 23 and 24, 1938, at the Bedford Springs Hotel, as the time and place for the Forty-fourth Annual Meeting of the Association; authorized the Secretary to invite the various publishing houses and office equipment houses to attend the Annual Meeting, but with no responsibility on the part of the Association for such exhibits; instructed the Secretary to notify all State Boards and Commissions of the time and place of the Annual Meeting, in addition to the various Courts; approved the "Clearfield County Plan."

In the afternoon of Friday, the general meeting of the Association convened to hear committee reports and act thereon. The Association approved a recommendation of the Committee on Prosecutors and Police opposing legislation seeking to abolish the office of District Attorney, and another recommendation for the reestablishment of the Pennsylvania State Police and Pennsylvania Motor Patrol as separate and independent agencies. It adopted a recommendation of the Committee on Program that the President be authorized to appoint a special committee consisting of ten members and a chairman, to be known as the Committee on Labor and Industry, whose duty will be to consider and make appropriate recommendations to the Association in any and all legal matters relating to labor and industry and the maintenance of social justice in the field of industrial relations. It also approved a recommendation of the same committee that the officers of the Association, under the guidance of the Executive Committee, be authorized, empowered and directed to solicit from appropriate sources contributions and bequests to be used for the work of the Committee on Public Relations.

In the evening the mid-winter dinner of the Association was presided over by President English. Hon. Boyle G. Clark, of the Missouri Bar, made an address on "Bar Administration in Missouri" and gave the members of the Association ideas which should prove valuable in working out a program for Pennsylvania. Hon. Stanley F. Reed, Solicitor General of the United States, was the next speaker and his subject was "Stare Decisis and the Constitution."

The Saturday morning session of the meeting was devoted entirely to bar integration. Chairman Ealy, of the Committee on Bar Integration, presided and intense interest was displayed. The Committee secured many valuable suggestions and ideas and decided to have a special session on February 5 at the Bar Association office in Harrisburg, for the purpose of making a further study of the entire situation.

In the issue of the Pennsylvania Bar Association Quarterly, January, 1938, from which the above details of the mid-winter meeting are taken, there is a notice that the portrait of James Wilson, Associate Justice of the United States Supreme Court, has been completed and presented to the Supreme Court. There were one hundred and ninety-two subscribers and the amount realized was considerably more than required to compensate the artist for painting the excellent portrait of the deceased Associate Justice. Dr. William Draper Lewis is chairman of this Committee, and former Chief Justice Robert von Moschzisker and Mr. Joseph W. Henderson are the other members.